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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING

JUNE TERM, 1854.

BY J. W. SHEPHERD,

STATE REPORTER.

Y0585

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1855.

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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HON. WM. P. CHILTON, CHIEF JUSTICE.
HON. DAVID G. LIGON,
HON. GEORGE GOLDTHWAITE, } Associate Justices.

M. A. BALDWIN, ATTORNEY GENERAL.
JOHN D. PHELAN, CLERK.

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REPORTS

OF

CASES ARGUED AND DETERMINED

AT JUNE TERM, 1854.

WYATT, A SLAVE, *vs.* THE STATE.

1. A slave's confessions of guilt to his master, when elicited or influenced by the fear of punishment or the hope of some benefit to be gained by making them, is not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation.
2. Therefore, in this case, the slave's confessions to his master were excluded, because the latter had said to him, "Boy, these denials only make the matter worse"; and the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect.

ERROR to the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THE plaintiff in error was indicted for burning his master's gin-house, was convicted, and sentenced to death. His confessions of guilt to his master, and afterwards to the examining magistrate, were admitted in evidence on the trial below, against the prisoner's objections; and he excepted to this ruling of the court. Other errors were assigned and insisted on in the argument; but it is deemed unnecessary to notice them, as the judgment was reversed solely on account of the

error in receiving the prisoner's confessions in evidence against him.

S. D. Hays and William M. Murphy, for plaintiff in error:

1. The court below erred, in admitting as evidence the confessions of the prisoner, as testified to by the prosecutor, his master, made while he was confined by his master. In order to entitle a confession to any weight, or to render it admissible in evidence, it must be shown to have been perfectly free and voluntary, "without the hope of reward or fear of punishment"; any hope or fear, however trivial, is sufficient to exclude them, for the law cannot determine the amount of influence which they might have had on the prisoner's mind.—1 Phil. Ev. 111, and notes 205, 212; 1 Green. Ev. § § 214, 219; 2 Stark. Ev. 36 (48); Roscoe's Cr. Ev. 36, 37; Whar. Am. Cr. Law, 252 (185); State v. Fields, Peck's (Tenn.) R. 140; 1 Wheeler's Criminal Cases, pp. 68, 69. These authorities show, that this confession cannot be presumed to have been voluntary, but was prompted by the fear of punishment if he denied, and the hope of being released if he confessed.

2. The court erred, also, in admitting in evidence the prisoner's confession to the justice, as detailed by his master; because, having once confessed, under the circumstances, to his master, he is presumed to have been actuated by the same motives, hopes, or fears, when subsequently confessing in the presence of one (his master) whom he feared, and to whom he had made the previous confessions; and this influence shall be presumed to have continued until palpably done away with.—Roscoe on Evidence, pp. 41, 42; 1 Phil. Ev. 111; 2 *ib.* 207; 2 Stark. Ev. 36; 1 Green. Ev. § § 225, 226; Serpentine v. The State, 1 How. (Miss.) R. 256; State v. Clarissa, 11 Ala. 57; Van Buren v. The State, 24 Miss. 516; Whar. Am. Cr. Law, 257; Peter v. The State, 4 Sm. & Marsh. 31.

3. The court erred, in admitting as evidence the slave's confessions to his master; for a slave's confession to his master, or to any one who has authority over him, cannot be presumed to be of that free and voluntary character which alone entitles it to be received as evidence. If the confessions of a hireling to his master or employer, and the confessions

of a wife to her husband, are inadmissible, upon the ground of fear, or hope, or duress, certainly, for much stronger reasons, should the slave's confesssions to his master be excluded.—1 Green. Ev. § 222.

P. T. SAYRE, for the Attorney General, *contra:*

The expressions, "Well boy, you have done it," cannot be connected with the confessions which were subsequently made by the prisoner. No force was given to them, and no inference was deduced from them, unfavorable to the prisoner. The common inference of guilt from silence does not appear to have been made. No punishment had been inflicted, nor was threatened. Even, therefore, under the circumstances presented in this bill of exceptions, if the question assumed the guilt of the prisoner, his confessions in answer to it would have been evidence.—Carroll v. The State, 23 Ala. 38.

The prisoner, after this, volunteered to confess, but his owner absolutely declined to hear him. Says he, "Master, I want to talk with you"; to which the reply was, "I don't want to hear a word from you." This shows that no effort, up to that time, had been made to extort any confession from him. Up to this period, no promises, or threats, and nothing approximating to either, had been used; this is clear from the bill of exceptions. It purports to set out all the conversations that had occurred between the master and the prisoner; and we find nothing, in the slightest degree tending to show, that an undue influence had been resorted to to get a confession.

The master, so far as the bill of exceptions shows, had not, up to this time, said anything which could be tortured into harshness; he had only used means proper for the safe-keeping of the prisoner. At the third interview we find him using the words, "these denials only make the matter worse." The condition of the prisoner was changed; he had been using violence on himself. We cannot tell in reference to what this expression was used. The bill of exceptions purports to set out all the testimony on this point, and it fails to show that any denials had been made in reference to burning the gin-house. The rule is, that a bill of exceptions must be construed most strongly against the party excepting. We must, therefore,

conclude that it was as to something else that the denials were made.—State v. Goodrich, 19 Ver. 121.

The true rule is, to ascertain whether the confession was made under circumstances calculated to render it untrue.—Carroll v. The State, 23 Ala. 38; State v. Grant, 22 Maine 173; Peter v. The State, 4 S. & M. 37. The bill of exceptions, in this case, shows, that the prisoner manifested great anxiety to say something about it when first arrested, and did tell all about it the first time his master would permit him to speak.—18 Conn. 180.

The confession made to the magistrate was admissible; it was unlike the confessions in the case of Clarissa, 11 Ala. 60, and of Spence v. The State, 17 Ala. 197.

CHILTON, C. J.—In considering cases of the kind before us, where the master or owner of the slave is introduced to prove his confessions, we must bear in mind the relation existing between them, of ownership and dominion on the part of the master, and subjection and dependence on the part of the slave. This relation, in many cases, may be supposed to exert an influence over the mind of the slave, with respect to such admissions, when considered in connection with declarations made by the master, which might not attach to declarations made by strangers or persons having no connection with the slave in any way.—1 Green. Ev. § 222. The slave naturally looks to his master for protection: he is accustomed to throw himself upon his leniency and mercy, and, it may be, by honest confessions of his guilt, to mitigate the chastisement which may await him as the punishment for his misconduct.

Keeping in view this relation, it is proper that we should examine with caution, whether the confessions of guilt made by a slave in interviews had with his master, or one having dominion over him, were not elicited or controlled by the relation, and predicated upon the fear of punishment or injury, or upon the hope of some benefit to be gained by making them. Before confessions can be received in evidence, it is necessary for the State to show that they were *voluntary*. The course of practice, says Professor Greenleaf, "is, to inquire of the witness, whether the prisoner had been

told that it would be better for him to confess, or worse for him if he did not confess, or *whether language to that effect had been addressed to him.*"—1 Green. Ev. § 219.

The examples given in illustration of the rule, will serve to show that the confessions in this case fall directly within the principle of exclusion. Thus, where the prosecutor said to the prisoner, "If you will tell me where my goods are, I will be favorable to you"; so, also, "It is no use for you to deny it, for there are the man and boy who will swear they saw you do it"; again, the prosecutor said to the prisoner, "He only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased"; in another case, where he said, he would be obliged to the prisoner if he would tell all he knew about it, adding, "if you will not, of course we can do nothing," meaning nothing for the prisoner; so, too, where the officer of the police said to the prisoner, "Now be cautious in the answers you give me to the questions I am going to put to you about this watch": in all these cases the confessions were excluded.—1 Green. Ev. § 220 and notes.

The defendant, in this case, must have known for what he was arrested. His master's gin-house had been burned the night of the day on which the prisoner had run away from his master. Suspicion had settled down upon him as the guilty agent, and the foreman, with other slaves, had been directed to watch and capture and take him, dead or alive. Shortly thereafter, viz., on the second or third night, the prisoner was taken, and brought to his owner, who said, "Well, boy, you have done it now"; thus, evidently assuming his guilt. Having confined the prisoner, the master went off; but as he was leaving, the prisoner said, "Master, I want to talk with you;" the answer was, "I don't want to hear a word from you." The master, returning next morning to where he had left the prisoner bound, found him tied as he had left him, but discovered that he had cut his hands with a razor in an attempt to sever the rope with which he was bound, and was bleeding from the wound. The master then said to him, "Boy, these denials only make the matter worse"; to which the prisoner replied, "Master, I have done wrong." The witness then asked him, "What have you done"? to which he answered, "I burnt your gin-house." On the same day,

the witness (the master) carried the slave before a justice of the peace for examination and commitment. Upon inquiry of the justice made of the master as to what the slave had done, he replied, "He has burnt my gin-house; examine him for yourself." The justice then examined the prisoner in the presence of the master, and the same confessions were made that had been made in the morning to the master.

It is said, in the affidavit made to support the substituted bill of exceptions, that the master, after detailing the conversation had with the slave, and his confessions, stated, that when he said "these denials only make the matter worse," he alluded to the fact, that the slave had previously denied having a knife; but it is not shown that he thus explained it to the prisoner, who might fairly have construed the remark as general, and have very naturally concluded that confessions of his guilt would make the matter better. We do not think the proof shows any intention on the part of the master to extort from the prisoner confessions, or to entrap him by assuming his guilt; on the contrary, his conduct appears to have been dispassionate and ingenuous; but he was doubtless unapprised of the caution and guards which the law throws around persons thus situated, or he would have advised the slave of the effect of his proposed confessions, especially since what he said to him as to the effect of his denials was calculated to excite in him the hope that a confession would make the matter better.

The confessions to the master, we think, were clearly improperly received; and under the rule as declared in Clarissa v. The State, 11 Ala. 57, the same inducement to confess continued, and must be regarded as vitiating those made before the justice of the peace. In such case, before the subsequent repetition of the confession before the justice can be received, especially when made in the presence of the master, the influence of the former inducement, and all fear of punishment from a recantation of his confessions, *must be "totally done away with."* If it be competent, under such circumstances, to render the repetition of the confessions legitimate proof, the greatest precaution should be used, so as to disabuse the mind of the prisoner, and he should be fully charged as to the effect of such confessions. Ordinarily, we

would not exclude confessions which are clearly shown to be voluntarily made before a magistrate, for the sole reason that the justice failed to caution the prisoner (20 Ala. 15); but where confessions have once been made by a slave to his master, under circumstances which will render them improper as evidence, the utmost precaution should be taken to advise him of their nature and effect, by the examining officer, and it must be clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation. Even then we should regard it unsafe to convict the prisoner upon such subsequent confessions, if wholly uncorroborated by other proof.—Clarissa v. The State, *supra*.

It follows from what we have said, that the sentence of conviction must be reversed, and the cause remanded, that the prisoner may again be tried; and it is ordered that he be retained in custody to await such further trial.

DILL *vs.* THE STATE.

1. When there is the least conflict, in a material point, between the evidence adduced by the State and that offered by the defendant, a charge, based upon the State's evidence, and indicating that the jury may look to it alone in passing on the guilt or innocence of the defendant, is improper; but if there is no conflict in the testimony, and the conclusion drawn by the court is the only one warranted by the facts and the law arising upon them, such a charge may be given.
2. If one see another about to perpetrate a felony, he may use such force to prevent it as may be necessary; and if, while so engaged, he is intentionally killed, it will be murder in the slayer.
3. As to reasonable apprehension of imminent danger to life or limb, when relied on as a defence.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. ALEX. B. CLITHERALL.

THE facts are set out at length in the opinion of the court.

W. S. Earnest, for the appellant.

M. A. Baldwin, Attorney General, *contra.*

LIGON, J.—The appellant was indicted in the Circuit Court of Walker county, for an assault with intent to murder. On the trial, as appears by the bill of exceptions, several witnesses were examined, who deposed to the following facts: That sometime in the month of January, 1851, the appellant and one John Irwin were quarrelling in a retail grocery in the town of Jasper, while one Burden stood between them, endeavoring to pacify them. John Henson took off his coat, and stepped up to the parties, but said nothing to either of them. The quarrel was kept up from before sunset until after dark. One Jefferson Henson, a relative of John Henson, was also engaged in the quarrel with Dill (the appellant), and both of them had become angry with him about a horse race, and frequently declared, during the quarrel, that they would have the race, the forfeit, or blood. Some time after night-fall (the moon giving light), it was announced that the race was ready to be run. John Henson then left the grocery, in company with several others, among them John Irwin and the appellant; the former before, and the latter behind the witness. The appellant called out to Irwin, naming him, and saying, "You are a damned liar; you said you could whip me, and that is a damned lie." Irwin and the accused were at this time near each other, and John Henson stepped between them, and proposed that they should leave the matter to him to adjust. This was agreed to by both parties; and he decided they should drop the quarrel and make friends. While this was going on, Irwin was on the left, and the accused on the right side of John Henson, who was thus engaged in attempting to reconcile the matter. The accused attempted to go around John Henson, to get within reach of Irwin; but John Henson moved his body so as to interpose it between the two, and the accused made an an attempt to stab Irwin. John Henson, seeing this, pushed him off; the accused, recovering from the push, exclaimed, "God damn you," and instantly stabbed John Henson, with a large pocket-knife, near the left nipple, inflicting a wound which confined him to his bed

for three or four weeks. The knife penetrated the cavity of the body near the heart, or was turned aside by a rib; the physicians could not say which, but they pronounced the wound dangerous. The accused was proved to have had his knife in his hand for ten or fifteen minutes before John Henson was stabbed; he was told to put it up, but denied having it out. Several persons had persuaded the accused to go home during the evening, but had failed to get him to do so. This is the substance of the proof.

The court charged the jury, in effect, 1st, That unless the prisoner would have been guilty of murder, if Henson had died from the effects of his wound, he could not be found guilty under this indictment of an assault and battery with intent to murder; that the assault and battery not being denied, the only question to consider was, the intent with which the blow was given; and this they were to ascertain from all the circumstances of the case. The court then correctly defined malice, and proceeded: that, if, on applying the law to the facts as proved, the jury should find the intent to kill coupled with malice, it would be their duty to convict as charged in the indictment.

2nd. That if the testimony of the witnesses for the State were true, and if the blow struck by the defendant was aimed at John Henson, the defendant would have been guilty of murder if John Henson had been killed by the blow.

3rd. That when one interferes to stop a brawl, and exercises no other force than is necessary for the object, having previously announced his purpose, the killing of him by one of the assailants will be murder.

4th. That where, from the nature of the attack, a man has reasonable ground to believe that there is an attempt or design to take his life, a man will be excusable for killing his assailant, although it should afterwards appear that no felony was intended: yet the man who thus acts, acts at his peril, and these grounds must appear on the trial to the jury to have been reasonable grounds, in order to excuse or justify him.

5th. The court further charged the jury, that, if the evidence did not satisfy them that the defendant was guilty of anassault with the intent to kill and murder, they could, if

they saw fit, find him guilty of an assault and battery, and assess a fine of not less than one cent, and not to exceed two hundred dollars.

The defendant then asked the court to charge the jury, that, if they believed from the evidence others had made threats of great bodily harm, and were improperly following the defendant, and detaining him, and the party assaulted had, by words or acts, induced the defendant to believe that the assailed was one of the parties, or ready to aid the parties in any assault that might be made upon the defendant, and the defendant was in fear of great bodily harm, and that he acted from a sense of personal danger, and not from malice, then they may acquit, although the defendant was mistaken in the actual danger. This charge the court refused to give, and charged the jury, that, to justify a person acting under apprehension from threats, there must appear to the jury reasonable ground for that person to believe that the threats are, at the time he acts, about to be executed.

The defendant further asked the court to charge the jury, that, if they believed the circumstances surrounding him were sufficient to create in his mind a reasonable impression of impending danger, or that great bodily harm was about to be inflicted upon him, he was excused in using such force as he thought necessary to protect him, even though death ensued, and the prisoner was honestly mistaken in the circumstances. This charge the court refused to give, and re-charged the jury, that the party thus acting must satisfy the jury that he had reasonable ground to believe that the threats of violence were about to be put in execution.

The accused excepted to the charges given, and the refusal to give those that were asked, and he now assigns them for error.

The first charge given by the court is free from any just exception. By its terms, the jury are told that they must look to every fact and circumstance which was in evidence before them, in order to ascertain the intention of the accused, and if from these they believed the stab with the knife was made with malicious intent, it would be their duty to convict. The facts of the case very clearly show that the

accused had his knife in his hand, ready to use, before the parties left the grocery; that shortly after leaving it, the accused attempted to renew the quarrel with Irwin, and Henson interposed as a peace-maker, when, on his own proposition, he was selected by Irwin and the accused to settle the dispute between them. While thus engaged in adjusting the quarrel, he saw the accused in the act of attempting to stab his antagonist, Irwin, and he (Henson), getting between them, pushed the accused back, who, on recovering himself, cursed Henson, and plunged his knife into his left breast, near his heart. The person, thus stabbed, had not quarrelled with the accused, had taken no part in the dispute betweeen the parties, but was acting as peace-maker between them.—Had the blow been fatal, there can be no question the accused would have been guilty of murder, as the absence of all provocation on the part of John Henson, the weapon used by the accused being deadly in its character, and the force with which its use was accompanied, are circumstances from which the law implies malice.—1 Russell on Crimes, 514, 515, 516, 519.

The second charge simply asserts, that if the jury believed the witnesses on behalf of the State, the accused would have been guilty of murder, if John Henson had died from the blow given with the knife by the accused. We were, at first, inclined to doubt the propriety of this charge, as it appears that witnesses were examined on behalf of the accused in the court below, and the charge refers the jury only to the testimony on behalf of the State, and seems to indicate that they might look to this alone in passing upon the guilt or innocence of the accused. This is clearly improper, where there is the least conflict, on a material point, between the evidence offered in defence and that produced by the prosecution; but if there is no conflict in the testimony, and it clearly goes to establish the conclusion contained in the charge, there would be no error in giving it. In this case, there is no conflict whatever, and the conclusion drawn by the court in the charge referred to, is the only one which the facts and the law arising upon them will warrant.

The third charge was correct, but more favorable to the accused than the facts of this case will warrant. All the evi-

dence tends strongly to show, that the only purpose of John Henson, at the time he was stabbed by the accused, was to hinder the latter from assaulting John Irwin with his knife, and in all probability killing him; and this, too, when Irwin was off his guard, and neither attempting nor threatening to do the accused any bodily harm. If one see another about to perpetrate a felony, he may use such force to prevent it as may be necessary for that purpose, and, if, while so engaged, he is intentionally killed, it will be murder in the slayer.

The fourth affirmative charge, and the two charges asked by the accused and refused by the court, as well as the charges accompanying the charges refused, have, in our opinion, no predicate in the testimony, as set out in the bill of exceptions; and as far as the charges given are concerned, the court erred in favor of the accused. The testimony does not show any attack made on the accused, nor any design on the part of Irwin or Henson to make such attack. The accused renewed the quarrel with Irwin after they left the grocery, without any provocation on the part of the latter; and was himself in the act of making a deadly blow at Irwin, when he was hindered by the timely interference of John Henson, whom he immediately stabbed, with the evident intent of killing him. In such a case, we are wholly at a loss to see, how the accused could invoke the aid of the legal principle, which is too favorably set out in the fourth charge, and perverted in the charges asked and refused.—Pritchett v. The State, 23 Ala. 39.

We are unable to perceive any error in the record, prejudicial to the appellant, and the judgment and sentence of the Circuit Court must be allowed to stand.

POWELL *vs.* THE STATE.

1. A *venire facias* is not void for the want of the seal of office of the court from which it issues.
2. No precise rule can be laid down as to the length or character of acquaintance which would render the opinion of a person not a physician admissible evidence on a question of insanity. In cases of general insanity—a total incapacity to distinguish right from wrong on any question—the same degree of observation is not required to discover the existence of the disease, as in cases of monomania or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case, the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. (In this case the opinion of the witnesses, in connection with the facts to which they deposed, was ruled admissible.)
3. In a case in which insanity was relied on as a defence to an indictment for larceny, the bill of exceptions recited that the State offered to prove, by a witness who had known the prisoner two years before the commission of the alleged offence, "that the prisoner, in his opinion, was a man of sound mind, and not insane, and that he could distinguish right from wrong; to which the prisoner objected": *Held*, construing the bill of exceptions most strongly against the exceptor, that the opinion of the witness referred to the prisoner's mental condition at the time of his previous acquaintance with him, and not at the time of the trial.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. ANDREW B. MOORE.

THE appellant, John C. Powell, was indicted at the Fall term, 1850, of the Circuit Court of Coosa, for grand larceny; to which he pleaded, not guilty, and insanity. From the bill of exceptions the following facts appear: "The State introduced a witness, who said, that he first knew the prisoner, in Chambers county, ten or twelve years since; that he was then a boy, and going to school with witness' boys, and was sometimes (he would not say frequently) at his house, with his boys, in passing from school to prisoner's house; that in 1845 the prisoner, with his father, removed to Coosa, and witness saw no more of him until he (witness) removed to

within a mile of prisoner's father, in Coosa, in 1847; that he conversed with him frequently, on ordinary subjects, during that year. This witness, in answer to a question if he could remember having conversed with the prisoner more than twice in that year, said, that he had conversed with him as much as that, but would not specify any other number of times, nor the subject of said conversations. He testified, also, that the prisoner left his neighborhood early in 1848, for the theatre of the Mexican war, and did not return until the fall of that year; that he believed he had conversed with him oftener than twice during that year, but could not remember or specify any other number of times; that after that fall he did not know where the prisoner was, not remembering that he had again seen him until after the commission of the alleged offence; that he was intimate with the prisoner's family; that the prisoner was frequently at his house, and he was frequently at the house of prisoner's father, where the prisoner lived: that the prisoner could read, write, and cipher, cut, plow, reap, sow, and do all other ordinary farm work; that witness was a farmer, and no physician. On this testimony, which was all witness said, the State offered to show, by said witness, that prisoner was a man of sound mind, and not insane; to which the prisoner objected. The court overruled the objection; the witness so testified, and the prisoner excepted. The State offered to prove by said witness, also, that the prisoner, in his opinion, could distinguish right from wrong; the prisoner objected; the court overruled the objection; the witness so testified, and the prisoner excepted.

"The State also introduced another witness, who testified, that he had known the prisoner for the last eight or nine years, and was intimate with him some of the time; that he lived, during some of that time, within about half a mile of prisoner's father; that he had been with him at public gatherings, had met him on the road, and had seen him at his house and other places; that he went to school with him a few weeks, and lived in the house with him about two weeks, and prisoner made some entries in witness' blacksmith books; that he could recollect no particular conversation with him; that the usual subjects of talk between them were, the weather

and his farming operations; that all his farming operations were in the field of his (prisoner's) father; that this acquaintance continued up to the time when the prisoner went to Mexico; that the prisoner could read, write, cipher, and do ordinary farm work. On this statement, the State offered to prove, by this witness, who also testified that he was no physician, that the prisoner, in his opinion, was of sound mind up to the time when he went to Mexico; to which the prisoner objected. The court overruled the objection; the witness so testified, and the prisoner excepted.

"The prisoner had introduced evidence, tending to show that, for several years previous to the commission of the alleged offence, he had been subject to periodical derangement of mind, that he was entirely insane at times, and was, at the time of the commission of the alleged offence, entirely insane, and incapable of distinguishing right from wrong.—The State also offered to prove, by the last named witness, that the prisoner, in his opinion, up to the time when he went to Mexico, viz., early in 1848, could distinguish right from wrong; to which the prisoner objected. The court overruled the objection; the witness so testified, and the prisoner excepted."

After conviction the prisoner moved in arrest of judgment, first, on account of the defective indictment; second, because of a defect in the drawing of the grand jury; third, because there was no indictment. On the trial of this motion, the prisoner excepted to the ruling of the court in refusing to let him prove, by the testimony of the judge of probate, that in fact no grand jury was drawn for the Fall term, 1850, of said Circuit Court, and that there was no evidence whatever in his office that any grand jury had been drawn for that term. The bill of exceptions sets out, at length, the preamble of the court at its Fall term, 1850, the *venire facias*, with the sheriff's return thereon, the empanneling of the grand jury, and the return of an indictment by them against the prisoner; but it no where shows any ruling of the court in relation to these matters, nor any question arising thereon.

The errors assigned are: the several rulings of the court on the evidence, as above set forth, to which exception was taken; "6th, the refusal of the court to arrest the judgment;

7th, the *venire* was no *venire;* 8th, the paper purporting to be a writ of *venire*, is not such a writ."

ELMORE & YANCEY, for the appellant:

The general rule is, that witnesses must testify to facts and not to opinions. In cases where the question is upon the insanity of a party, the rule has been extended, so as to allow persons who are proven to have had some peculiar opportunities of knowing the prisoner, and of observing his mind, from having intimacy and familiarity with him, to give their opinion after stating facts showing they can form a correct opinion.—The State v. Norris, 16 Ala. 776; Roberts v. Trawick, 13 *ib.* 84.

It is insisted, that neither of the witnesses examined to prove the sanity of the prisoner, was competent to give an opinion on that question: 1, they had no long familiarity or intimacy with the prisoner; 2, they had no particular knowledge or observation of the workings of his mind. The first witness was not asked for his opinion as to the sanity of the prisoner, based on facts detailed by him, but was asked to depose to his sanity as an independent fact in the case, not connected with his detail of facts. This, it is insisted, he could not depose to: 1, because a witness can only give an opinion on that question, for the fact of sanity or insanity can alone be found by the jury; 2, he can only give an opinion as based on facts to be detailed by him; 3, it is to be left to the jury to say what his opinion is worth, by considering it in connection with the facts on which the witness founds his opinion.—The State v. Norris, 16 Ala. 776; Clark *ads.* The State, 12 Ohio R.; Grant v. Thompson, 4 Conn. 203.

This witness was requested to state if the prisoner was a sane man—was sane at the time of trial. It is insisted that the facts detailed by him show that he was not competent to give evidence upon that point at that time, as he had not known anything of him for a long time previous to the commission of the offence, and the record shows that he had been indicted for three years before the trial.—Dickinson v. Barker, 9 Mass. 225. It is insisted that a witness cannot testify, as a fact, that in his opinion a prisoner could distinguish right from wrong, for this is but a conclusion from

the evidence, which alone can be drawn by the jury; and to allow a witness to swear to the sanity of the prisoner, and that he could distinguish right from wrong, would leave nothing for the jury to find on this plea.—2 Green. Ev. § 372.

It is also insisted, that even if a witness is competent, after detailing facts showing his competency to testify as to the capacity of the prisoner to discern right from wrong, he can only give his opinion in connection with those facts, and as based on them, in order that the jury may test the value of his opinion. Neither of the witnesses gave an opinion on this point, as based on such a statement, but deposed to the capacity of the prisoner, in this regard, without reference to such statement.—State v. Norris, 16 Ala. 776.

The first witness was asked as to the capacity of the prisoner to discern right from wrong, at the time of the trial, when from his statement of facts, he had not known anything of him for a long time before the deed was committed; when the true issue was, could he do so at the time he committed the act.—2 Green. Ev. § 373; see answer of the judges in McNaughton's case, in Greenleaf on Evidence. The opinion of a witness not medical, being based on facts which he must detail, to be competent, must be confined solely to the time when the facts existed; that is, if he details facts in 1850, he can only give an opinion for 1850. The jury alone can infer from these facts and that opinion that the prisoner was sane at a later period.

The judgment should have been arrested, because the paper purporting to be a writ of *venire* is not under seal. That writ is a part of the record of conviction.—State v. Williams, 5 Porter 130, 135; State v. Darin, 2 Speer's So. Ca. 211; The People v. McKay, 18 Johns. 212; McLeod v. Reid & Co., 20 Ala. 576; Clay's Digest, 452 § 10; Coll. on Part. §§ 717, 718. In criminal cases, the court will consider even slight errors as grounds of reversal, the intendments being *in favori libertatis et vitæ.*

P. T. Sayre, for the Attorney General, *contra:*

1. It is a well settled rule, that under certain circumstances, a witness may state his opinion as to the sanity or insanity of a party, who sets up insanity as a defence, even though the

witness be not a physician.—Norris v. The State, 16 Ala. 776.

2. The facts and circumstances, as detailed in the bill of exceptions, constituted a sufficient predicate for the admission of the testimony. These facts show, that the witnesses had opportunities of personal observation, from which they could come to some conclusion or belief, as to the sanity or insanity of the party, and nothing more is required. What weight will be given to an opinion thus formed, is a question for the jury.—2 Iredell 85 ; 16 Ala. 779.

3. A man is not to be excused from responsibility, if he can distinguish right from wrong, as to the particular act he is then doing.—McAllister v. The State, 17 Ala. 437. And the proper question to be decided by the jury, is, whether the prisoner knew right from wrong, at the time of doing the act.—2 Green. Ev. § 373 ; McAllister v. The State, *supra*.—The opinion of the witnesses as to whether the prisoner was sane or insane, did not meet the issue to be decided by the jury ; for, although he might be partially insane about some matters, and totally insane as to others, yet, if he knew right from wrong, at the time of the commission of this act, that partial or total insanity would not have availed as a defence. The very question, then, to be decided, was, Did the prisoner know right from wrong ? and that could only be answered by propounding the direct interrogatory to the witnesses, Did the prisoner, in their opinion, know right from wrong ? The same rule applies, as to those cases in which it become necessary to prove a certain state of mind, as to whether it was operated upon by love, fear, &c.; and this can only be established by opinion, based upon facts more or less conclusive, as the case may be.

4. Insanity must be proved to the jury, like other diseases or facts, and evidence of the state of mind of the party, both before and after the act done, is admissible.—McLean v. The State, 16 Ala. 680 ; McAllister v. The State, 17 *ib.* 438.

5. The indictment is good, and all the proceedings of the court appear to be regular. The court, therefore, committed no error in overruling the motion to arrest the judgment. A paper purporting to be a *venire facias* appears in the record, and under our statutes it will be held good. A *venire facias* is a writ, and "all writs issued from any of the courts, shall

bear teste in the name of, and be signed by, the clerk of the court from which they may be issued."—Clay's Digest 335, § 125. So, however it may have been at common law, "writs," in this State, are not required to be under seal. The practice in this State has never been to give sealed writs. The motion was made to arrest the judgment, because there was no *venire*. The object was, to make the motion in arrest do the office of a plea in abatement; but "no plea in abatement shall be allowed to the array of the grand jury, &c., except at the term at which the indictment is found."—Clay's Digest 458, § 51; The State v. Clarissa, 11 Ala. 61; Morgan v. The State, 19 Ala. 559. The pleading to the indictment admitted its genuineness (State v. Clarkson, 3 Ala. 383); and, besides, the statute requiring the clerk to mark "filed" on an indictment is merely directory, and cannot in any way affect the action of the grand jury.

GOLDTHWAITE, J.—That a *venire facias* was not void for want of the seal of office of the court from which it issued, was directly decided by this court in the case of Maher v. The State, 1 Porter 265; and as the question is purely a technical one, involving no principle, we do not feel authorized to depart from it.

In relation to the action of the court below, in allowing the opinion of certain witnesses, as to the sanity of the prisoner, to be given in connection with the facts stated by them, we are unable to discover any error in the shape in which the question is presented by the record. We have held, on several occasions, that the opinion of witnesses, in connection with the facts, was admissible, when it was apparent that those who were called upon to testify occupied a position toward the person alleged to be insane which enabled them to form a correct judgment as to his mental condition.—Roberts v. Trawick, 13 Ala. 84; State v. Norris, 16 Ala. 776; Florey v. Florey, 24 Ala. 241. This is the general rule; but in every case where this question arises, the character of the insanity is a matter of no small importance, in determining correctly as to the admissibility of the opinions of witnesses. If the evidence tended to establish that the prisoner, from mental imbecility, was incapable of distinguishing between right and

wrong, or that his case was one of general insanity, by which we mean madness on all subjects, it is obvious that it would not require the same degree of observation to discover the existence of the disease under such circumstances, as in cases of monomania or partial derangement, where the particular delusion might frequently escape the attention of the most acute observer, or the most intimate association. The circumstances which would enable the witness to form an accurate opinion as to the mental condition of the party in one case, would be worth nothing in the other. There are some diseases of the body, which it requires no physician to detect or pronounce upon. They are shown by external symptoms, so marked in their character, as to be readily seen and determined by every one of ordinary intelligence; and the total want of reason, as manifested by complete idiotcy, or the utter dethronement of the intellect, as exhibited by mania, or raving madness, seldom, if ever, requires any long acquaintance or close observation to discover. Opinion is necessary, for the reason that it may be impossible to convey to the mind of the jury through the medium of language, a distinct idea of the true condition of the party by a statement of the facts alone (Norris v. The State, *supra*); but it is impossible to lay down any precise rule as to the length or character of acquaintance which would render the opinion of a witness admissible on this question. All we can say is, that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. Applying this principle to the case before us: If the defence relied on was general insanity, or an incapacity to distinguish right from wrong on any question, each of the witnesses whose testimony was objected to was competent, as their acquaintance with the prisoner was of a character which would render it next to an impossibility that if the disease had existed to that extent, they should not have known it. And their opinion as to his sanity, or (what is the same thing) his capacity to distinguish right from wrong, would, in that aspect of the case, when based upon the facts, be admissible; but if the insanity which was set up to excuse the prisoner was monomania—a particular delusion connected

with the act, such, for instance, as an insane conviction that the property taken belonged to him—then we agree that neither of the witnesses had that degree of knowledge of the party, which would enable him to form a correct opinion as to his sanity.

The record does not disclose as fully as it might the character of the insanity which was set up on the part of the prisoner, but it sufficiently appears that there was some evidence offered, tending to show that he could not distinguish right from wrong; and with a view to rebut testimony of this nature, we think, under the circumstances proved, it was competent for both of the witnesses to give their opinion, in connection with the facts, as to his mental condition, and to state the conclusion upon their minds (the result of their previous acquaintance and those facts), that he could distinguish between right and wrong.

It is insisted, however, that the record shows that one of these witnesses was permitted, against the objection of the defendant, to give his opinion as to his sanity at the time of the trial. We do not place that construction upon the record. The bill of exceptions, after stating the means of information which the witness had for knowing the mental condition of the prisoner, and after stating the facts tending to establish his sanity, proceeds thus: "The State offered to show, by said witness, that the prisoner was a man of sound mind, and not insane. The prisoner objected; the court overruled the objection, and the witness so testified. The State also offered to prove by said witness, that the prisoner, in his opinion, could distinguish right from wrong, and the prisoner objected; but the court overruled the objection, and the witness so testified." It is to be remarked, that the indictment was found in 1850, and the witness had testified he had no recollection of having seen the prisoner from 1848 until after the commission of the alleged offence. We think, therefore, that the natural inference would be, that in speaking of his sanity, he referred to the period of his acquaintance with him up to the time he last saw him before the offence. He says, in effect, that he knew the prisoner some years since, and is then asked, whether, in his opinion, he was of sound mind, and again, whether he could distinguish right from wrong. The

objection does not appear to be on the ground that the witness gave his opinion as to his sanity at the time of the trial, but that he gave his opinion at all. The bill of exceptions must be taken most strongly against the exceptor (Mallory v. Stodder, 6 Ala. 801); and without forcing the language employed, we may well suppose that the witness referred the sanity of the prisoner to the antecedents—to his knowledge of, and acquaintance with him, before the commission of the act. Had it been otherwise, the objection should have been more specific.

We see no error in the record, and the judgment is affirmed.

ESKRIDGE *vs.* THE STATE.

1. The statutory offence of mayhem (Code, § 3105) may be committed on a slave.
2. The fact that the defendant was intoxicated—"that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his declarations or confessions of guilt inadmissible.
3. The party who insists on error must make the record affirmatively show it.
4. When the indictment alleges that the slave who was maimed belonged to the defendant's wife, while the evidence shows that the defendant himself was the owner, the variance is fatal; the allegation of ownership, being a material part of the description of the slave, must be proved as laid, in order to identify the person on whom the offence was committed, thus enabling the defendant to prepare his defence, and making the record of his conviction or acquittal a protection against a second indictment for the same offence.
5. Although the master may use such means, and so much force, to any extent, as will be effectual to subdue his slave, yet he may not deprive the slave of life or limb, unless impelled to such an act by necessity.
6. The prisoner being indicted for mayhem of a slave, the evidence showed that he shot the slave in the leg, rendering its amputation necessary, and "that the shot seemed to go together, making a continuous wound;" the court charged the jury, "that, as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, *they might look to the character of the wound, for the purpose of determining whether he fired the gun with the view of striking and disabling the leg*": *Held*, that the charge was not erroneous.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. ALEX. B. CLITHERALL.

RICHARD M. ESKRIDGE, the appellant, was indicted at the Spring term, 1854, of the Circuit Court of Sumter, for disabling a leg of a slave named Maria, alleged to be "the property of Mrs. Eskridge," by shooting her in the leg with a shot gun, and was convicted. The principal evidence against him consisted of his own confessions, as testified to by the physicians who amputated the limb of the slave. No question was raised in the court below as to the admissibility of the evidence; the only questions reserved by the bill of exceptions relate to the charges of the court, which will be readily understood from the opinion. There was no demurrer, and no motion in arrest of judgment.

A. A. COLEMAN, for the appellant:

1. There is no such offence known to the statute law of this State as mayhem of a slave. The Code (§ 3105) applies only to the crime when committed on a white man. This view does not conflict with the provision in the sixth article of the State constitution, which merely directs what the punishment shall be. The Legislature has wholly failed to enact a law upon the subject. A negro, in this State, is nothing more than a chattel, except in those cases in which, by express legislation, he is recognized as a human being, by making him amenable for his crimes, and protecting him against abuses.

2. If the mayhem of a slave is recognized at all, it must be by reference to the common law; and by the common law, it is at most a misdemeanor. The punishment, therefore, should have been as directed in section 3301 of the Code.

3. The offence being, at most, recognized only by the common law, the indictment should have conformed to all the requirements of a common-law indictment. The indictment, however, is not good as a common-law indictment, and is a mere blank sheet of paper, unless made effective by the Code (§ 3503), which is denied.

4. The defendant's confessions should have been entirely discarded by the court, because the witness was unable to recollect and state the whole conversation.—Starkie and

Phillips on Evidence, title "Confession"; also Wharton's Crim. Law.

5. The defendant's confessions should have been excluded, also, because of his drunken condition at the time they were made. They were not freely and voluntarily made, and were entitled to no more consideration from the court than the ravings of a madman.

6. The ownership of the slave is an essential allegation of the indictment, and it must be proved as laid.—State v. John, 2 Ala. 130; State v. Flora, 4 Porter —; State v. Phereby, 16 Ala. 174; State v. Winter & Scisson, 20 Ala. 39; 2 Virg. Cas. 394; 11 U. S. Digest, § 385.

7. Allegations which are descriptive of the identity of that which is legally essential to the charge of the indictment, are not surplusage, but must be proved as laid.—2 U. S. Digest, p. 149, §§ 105, 106, 107, 108; Noble v. The State, 15 Maine R. 476; United States v. Brown, 3 McLean's R. 255; Hooker v. The State, Ohio Con. R. 819; Archb. Crim. Pl. 30, 108; 1 Greenl. Ev. §§ 65, 67; 2 Russ. on Crimes, p. 705; 1 Phil. Ev. 506, 530; 3 Stark. Ev. 1531.

8. The second charge was calculated to mislead the jury. There cannot exist an "absolute necessity" to do such an act. Although the defendant had the right to maim or kill his slave, in order to reduce him to subjection, when in active and open rebellion against his authority, still he might have avoided the act by fleeing, and therefore the necessity could not be absolute. The jury may have been led into the error of supposing that it was the master's duty to flee from his slave. As to the master's dominion over the slave, see Dave v. The State, 22 Ala. 23.

A. Martin, for the Attorney General, *contra:*

1. The averment in the indictment of the ownership of the slave was unnecessary and immaterial; and therefore it was unnecessary to prove it as laid.—United States v. Howard, 3 Sumner's R. 15, 18; Commonwealth v. Cooley, 10 Pick. 37; The State v. Scott, 1 Hawks (N. C.) 24; Commonwealth v. Arnold, 4 Pick. 252; Stark. Ev. 1533.

2. There was no error in the charges of the court.—Dave v. The State, 22 Ala. 23.

CHILTON, C. J.—1. We were at first inclined to doubt whether the statute defining the crime of mayhem (Code, § 3105) extended to the disabling of slaves, as ordinarily they are not to be considered as embraced in statutes unless specially named; but upon an examination of the constitutional provision relating to the subject, we feel satisfied that they are included. That declares, that "Any person who shall maliciously dismember or deprive a slave of life, shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, and on the like proof, except in case of insurrection of such slave."—Art. vi., title Slaves, § 3. It is clear, we think, from this provision in the constitution, that both slaves and freemen are placed upon the same footing, as respects the maliciously depriving them of life, or dismembering them; and that this provision in the statute is in accordance with, and designed to carry out, that clause in the constitution.

No point is presented by the bill of exceptions, respecting the declarations or admissions of the defendant, made to Doctors Colgin and Hadden. No objection was made in the court below to the admission of the testimony, and no sufficient reason appears why it should have been excluded. It is said, the defendant was much intoxicated when he made the declarations as to his having shot the slave, that he was excited, and scattering in his conversation, and that no one who heard him could have repeated all he said. These declarations were deposed to by physicians; they could doubtless have formed a very correct idea as to whether the defendant's mental condition was such that he knew what he was saying. It does not follow necessarily, that because the party was much intoxicated his reason was so far dethroned as to disable him from comprehending the effect of his admissions, or from giving a true account of the occurrence to which they had reference. Neither does it follow, because the witnesses were unable to detail everything the accused said to them while they were amputating the wounded limb of the slave, that they failed to give his entire declarations as to his agency in inflicting the wound. We are not allowed to presume that the court below permitted garbled statements to be given in evidence to the jury, or that it allowed the confessions of a

madman or maniac, made so by intoxication, to be received as evidence of the prisoner's guilt. On the contrary, we must intend, that the court was influenced to admit the declarations by evidence sufficient to satisfy it of the capacity of the prisoner to make confessions which could be relied upon as evidence, at least in some degree, and that, although the witnesses did not and could not depose to all the prisoner said, yet what they did depose to was a fair and full statement of all he said upon the subject of his having committed the offence, and that his statements were not garbled and tortured by the witnesses, omitting parts of the conversation tending to qualify the portions deposed to, and to exculpate the prisoner.

If any circumstance had existed, tending to render the evidence of the prisoner's declarations inadmissible, it would doubtless have been set out in the bill of exceptions. As it is, we cannot say the proof was illegal, as we can indulge no presumption adverse to the regularity of the judgment of the court below. The rule requires the party who insists that the court committed an error, to make the record affirmatively show it.

As to the charge of the court, which asserts that the ownership of the slave, although averred in the indictment to be in Mrs. Eskridge, may be proved to be in the prisoner, and that the variance would be immaterial, we think the court committed an error. It is true, there are some cases which seem to countenance the doctrine asserted by the charge. They will be found cited by the counsel representing the State. But recurring to elementary principles and long recognized precedents, from which it is always unsafe to depart, we feel constrained to hold that the averment of ownership of the slave is a part of the description of the person on whom the offence was committed; and without now intending to decide what would be our opinion, if the proof had stopped short of proving ownership at all, yet, being proved in another, we think the variance is fatal. "Slave Maria, the property of Mrs. Eskridge," is not the Maria who belongs to the prisoner; and if the averment of ownership is immaterial, considered as a part of the description, and it may suffice if any person other than the owner stated in the indictment is the pro-

prietor, why may we not disregard the word slave, which is also descriptive? Indeed, it would be difficult to fix upon a point where we might with any safety stop. The person on whom the injury was inflicted must be described so as to be identified, that the prisoner may be prepared to make his defence, and so that the record of his conviction or acquittal would furnish him a protection, should he be again indicted for the same offence.

"It is," says an eminent writer upon the subject of evidence, "a most general rule, that no allegation, which is *descriptive* of the *identity* of that which is legally essential to the claim or charge, can ever be rejected."—3 Stark. Ev. 1529. In such case the variance will be fatal, inasmuch as it destroys the legal identity of the claim or charge alleged with that which is proved.—*Ib.* 1531-2. In describing slaves, who generally have but one name, and never a surname, the statement of the name of the owner is a very proper allegation descriptive of the slave. The fact of ownership, *as such*, is immaterial in cases of this character, but, when averred as a *matter of description of the slave*, and it is proved that the slave on whom the injury has been committed is the slave of another, and not of the person charged in the indictment, the identity is destroyed; and the prisoner, if convicted of mayhem upon the indictment charging him with dismembering a slave of Mrs. Eskridge, could not interpose this conviction in bar of another indictment for mayhem upon his own slave, any more than if indicted for stealing a black horse he could be convicted for stealing a white one.

The true rule, in our opinion, is, that no allegation in an indictment, whether it be necessary or unnecessary, whether it be more or less particular, which is *descriptive* of the *identity* of that which is legally essential to the charge, can ever be properly rejected as surplusage. That there may not be cases, where the proof falls short of establishing a variance, in which immaterial descriptive averments may be disregarded, the offence having been established without their being proved, we do not deny; but where it is affirmatively shown that a descriptive allegation is untrue, and a variance is thus established, especially as to the person on whom the offence is charged to have been committed, the identity of the offence

charged with that proved ceases; and it is against common right to indict a man for an offence upon one person and find him guilty of an offence against another. He has not been indicted for the latter offence, and cannot, therefore, be properly convicted of it.

Mr. Roscoe, in his work on Criminal Evidence, page 106-7, says: "Not only must the names descriptive of the prosecutor, or party sustaining the injury, be strictly proved, but, where the name of a third person is introduced into the indictment, *as descriptive of some person or thing*, that name also must be proved as laid." An example given by him of an adjudged case is in point, to show the correctness of the position we here advance: "On an indictment under the black act, for maliciously shooting A. Landon, in the dwelling-house of *James* Brewer and *John* Landy, it appearing in the evidence that it was in the dwelling-house of John Brewer and James Landy, the court said, that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance.—Durore's Case, 1 Leach 352; 1 East Pl. Cr. 45; Queen v. Soley, 2 Salk. 595; State v. Martin, 3 Murph. 533. So also, where a party was indicted for feloniously marrying Elizabeth Chant, *widow* (his former wife being alive), and the proof showed that said Elizabeth was a single woman, *held* by all the judges that the variance was fatal, although it was not necessary to have stated more than her name.—1 Moody's C. C. 303.

We are unable to perceive any error, against the prisoner, in the second charge, which asserts the proposition, "that if the slave was in rebellion against the master, he was authorized to employ sufficient force to reduce her to subjection, and if she could not be so reduced to subjection, except by shooting her, he might do this; but that a resort to such force would not be permitted, unless it was absolutely necessary to reduce her to subjection." The charge must be construed with reference to the proof in the cause. From this it appears, that when the master attempted to chastise the slave, she seized an axe and told him not to come near her, else she would kill him; that on his nearer approach, the slave moved threateningly toward him with the axe; that the master then

retreated to the house, got his gun, with which his boys had been in the habit of shooting birds with small shot, but which, without his knowledge, had been loaded the day previous with buck shot; that upon coming out of the house, with his gun, the slave moved off sidewise, with the axe in her hand half raised; that defendant (the master) called to her to stop, which she refused to do, and thereupon he shot her, inflicting the wound. Now, although the owner may employ such means, and so much force, to any extent, as will be effectual to subdue his slave, as we decided in Dave v. The State, 22 Ala. 23, yet he may not deprive the slave of life or limb, without being impelled to such an act by necessity. Whether this charge is not too favorable to the prisoner, when considered with reference to the testimony, it appearing that the slave was retreating from him; whether the master, in any case where it is not required for his self-protection and defence, or justified or excused upon some principle of law as applicable to free persons, would have the right thus to shoot off the limb of his slave; whether, in short, except in case of insurrection of such slave, the constitution of this State, which declares that "any person who shall maliciously dismember or deprive a slave of life, shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, *and on the like proof*, except in case of insurrection of such slave," does not guaranty to the slave the same protection as respects maliciously killing or dismembering him, as is extended to free white persons,—are questions which we are not now called upon to decide; for, if the charge which justified the master in shooting the slave in the leg, if this were absolutely necessary *to reduce her to subjection*, and not as a means of overcoming her forcible resistance, is opposed to the above provision of the constitution, it is an error of which the prisoner has had the advantage, and consequently one of which he cannot complain. We are satisfied that it contains no error adverse to him.

The only remaining question grows out of the third charge given to the jury, which was, "that, as there was no proof as to the distance the prisoner was from the slave when the wound was inflicted, the jury might look to the character of the wound, for the purpose of determining whether he fired

the gun with the view of striking and disabling the leg." It will be borne in mind, that the gun was loaded with shot, and they seemed to "go together," as the witnesses stated it, making "a continuous wound." This was a circumstance of which the jury might very properly consider, as indicating that the prisoner was near to the slave when he fired; for experience teaches that shot discharged from a shot gun at any considerable distance will scatter. Being so near that the shot made but one orifice, it was a question whether, at this short distance, the prisoner would be likely to miss his aim; in other words, whether he did not aim at the leg of the slave which the shot struck. Nothing is more common, in cases of homicide and wounding, than to look at the character of the wound, to aid in attaining to a correct conclusion as to the manner in which it was inflicted. We think this charge was unobjectionable.

For the error in the third charge, as to the variance, the judgment of the Circuit Court must be reversed, and the cause remanded. The usual order will be made for remanding the prisoner from the penitentiary to the jail of Sumter county, where he will remain in custody, to await his trial upon a new indictment, should the State prefer one at the next term, or until otherwise discharged by due course of law.

STARR *vs.* THE STATE.

1. An indictment (under the Code) for trading with a slave, is fatally defective, when the slave is described as "a slave, the property of Benajah S. Bibb, whose name is to the jury unknown."

FROM the Circuit Court of Montgomery.

Tried before the Hon. ROBERT DOUGHERTY.

DANIEL STARR was indicted for trading with "a slave, the property of Benajah S. Bibb, whose name is to the jury un-

known." He pleaded not guilty to the indictment, but was found guilty by the verdict of the jury, and fined $200. The questions of law reserved for the consideration of this court, appear from a bill of exceptions which was taken on the trial, and arise upon the charges which the court gave and refused.

ELMORE & YANCEY, for the plaintiff in error:

Each count in the indictment is defective, in not naming, or in some other way describing, the slave with whom the defendant was guilty of trading, so as to notify him with what slave he was accused with trading (Francois v. The State, 20 Ala. 83), or to enable him, on a subsequent indictment for the same offence, to plead a former conviction or acquittal.—Murphy v. The State, 24 Miss. 590. The only difference between this case and that of Francois v. The State, *supra*, is, that there the name of the owner was not alleged. This fact, however, did not affect the decision, as the allegation was omitted under the act of February 7, 1850. The allegation of the owner's name is no description of the slave. The owner may have hundreds of slaves: and the defendant may have written permission to trade with some of them, and verbal permission to trade with others. The owner may have several plantations with a different overseer on each; and these overseers are authorized to grant permits to trade with the slaves. Which one of these overseers shall the defendant summon? The slave may have been hired out by the owner. The allegation of the owner's name gives the defendant no clue by which to ascertain whether he must summon the owner, or the hirer.

P. T. SAYRE. for the Attorney General, *contra:*

No question was made in the court below of the sufficiency of the indictment, and none is reserved upon the record: there was no demurrer, and no motion in arrest of judgment. This court can only consider the questions reserved: if the defendant wished to present any other questions than those reserved by bill of exceptions, he ought to have applied for a writ of error.

But the indictment is good. The allegation of the owner's name is a sufficient description of the slave. The slave's name is not an essential ingredient in the offence: it is only

necessary that the description should be sufficient to advise the defendant of the offence with which he is charged, and to enable him to defend it. The Code (§ 3513) authorizes the allegation that the slave's name "is to the jury unknown," and it could be done, also, by the common law.—Francois v. The State, 20 Ala. 83.

LIGON, J.—The charge in each count in this indictment describes the slave with whom the defendant is averred to have traded, and from whom he received the commodity mentioned in the indictment, as "a slave the property of Benajah S. Bibb, whose name is to the jury unknown."

This description is too general to require the defendant to be put to his answer of the charge. Benajah S. Bibb may be the owner of many slaves; and it would be impossible for the defendant, under a charge so general, to prepare his defence safely and effectively. He may have authority from the master or overseer of the slaves of Mr. Bibb to purchase from some of them the commodity mentioned in this indictment, and this authority may be verbal, for the law authorizes it to be given in that form. The dealing may have been with one of these; and if the defendant were advised with which of Bibb's slaves he was accused of trading, he might be able to show that he did so under full authority, previously obtained, for that purpose.

Again; we cannot well see how this defendant could defend himself against a second charge for the same offence. No *day* is required to be laid in the indictment; the name of the master does not ascertain the slave; and without something more definite than what is found in this record, we can see no reason why the defendant could not be again convicted of the same offence, and thus be twice punished for the same crime.

In the case of Francois v. The State, 20 Ala. 83, we held the indictment to be bad for uncertainty. The charge there was, selling "to a slave whose name is to the jurors unknown." In Brown v. The Mayor and Aldermen of Mobile, 23 Ala. 722, the proceeding was to recover a fine under an ordinance of the city of Mobile against trading with slaves, the terms of which are similar to our statute. The statement filed did not contain the name of the slave, or of his owner; both

were in blank. We held the statement bad for uncertainty.

In the former of these cases, it is said, "We would not, however, be understood as deciding, that it was absolutely necessary to describe the slave, in indictments for this species of offence, by his name. This is but one mode of description; and any other, which would afford to the defendant information as to the *particular slave* to which the charge referred, we are inclined to think *would be sufficient*." That there may be cases, in which the requisite certainty may be attained *without naming the slave*, we admit; for instance, if the owner's or employer's name is given, and it be averred that the slave is the only one in his possession; or that the slave is employed in a particular service, and he is the only one so employed by him; in either of these cases, we are inclined to think the indictment would be good. But unless certainty is approached by some such averment, the defendant should never be put to his defence."

Let the judgment be reversed, and the cause remanded; and the defendant remain in custody until discharged by due course of law.

THOMPSON ET AL. *vs.* THE STATE.

1. An indictment (under the Code) which charged that the defendants "before the finding of the indictment, assaulted and beat B. B., against the peace and dignity of the State of Alabama," held sufficient, on the authority of Noles v. The State, 24 Ala.
2. Where several persons are jointly indicted for an assault and battery, and one of them pleads guilty, the others, who plead not guilty, cannot claim, as a matter of right, to be tried separately from him.
3. A person who believes that his property has been stolen by a slave, has no right, without process of law, to search the slave's dwelling on the premises of his master.
4. Where several persons, without process of law, enter upon a man's premises, for the purpose of searching his negro houses for stolen property, and one

of them commits an assault and battery on the owner, the others are not responsible for it, unless the assault was committed during the prosecution of their original unlawful purpose, or within such a time afterwards as to satisfy the jury that it was connected therewith; but if the evidence conduces to show that their original purpose not only extended to the search, but contemplated the use of force if opposed or interfered with on the premises, a charge is properly refused which assumes that the common design was limited to the search.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THE indictment was as follows:

"THE STATE OF ALABAMA, } *Circuit Court,*
Wilcox County. } Spring Term, 1853.

"The grand jury charge, that, before the finding of this indictment, Thomas H. Thompson, Robert Thompson, John W. Creagh, Thomas Trawick, Hobson Thompson, Thomas Burps, and Calvin Nobles, assaulted and beat Bowen Bennett, against the peace and dignity of the State of Alabama."

On the trial, the death of Thomas Trawick, one of the defendants, was suggested, and the prosecution abated as to him; and a *nolle pros.* was entered as to John W. Creagh. The other defendants then demurred to the indictment, but their demurrer was overruled; "and thereupon Hobson Thompson pleaded guilty to the indictment, and the other defendants pleaded not guilty, and claimed as a right, and asked of the court, to be tried separate and apart from the said Hobson Thompson; which the court refused to allow." The trial then proceeded, and all the defendants were found guilty. The evidence, as set out in the bill of exceptions, shows that the defendants went to Bennett's house to search his negro houses for certain stolen property belonging to the defendant Burps, and while on the premises the assault was committed by the defendant Hobson Thompson, under the circumstances stated in the opinion of the court. The court refused several charges requested by the defendants, and they excepted to each refusal; all of which will be readily understood from the briefs and opinion.

The errors assigned are, the overruling of the demurrer to the indictment, the refusal to let the defendants who pleaded

not guilty be tried separately from him who pleaded guilty, and the several refusals to charge as requested.

Geo. W. Gayle, for the appellants:

1. The indictment is invalid, in not being according to the forms of the common law.—See argument and authorities in Noles v. The State, at this term.

2. The indictment fixes *no time* at which the offence was committed. In murder cases, *where no limitation can run*, this may not be so important; but prosecutions for assault and battery are limited, and some time must be fixed within the statute, or defendants cannot know how to defend themselves.

3. The court below erred in refusing to let those who had pleaded "not guilty" be tried apart from one who had pleaded "guilty." This is not a question of discretion, growing out of an application to *sever the trials*. When the motion was made, he who had pleaded "guilty" had no trial to come off; his was a mere assessment of damages. The others, who pleaded "not guilty," may have been acquitted. The different pleas, then, produced two distinct causes, and it was illegal to try them together. The plea of "guilty" necessarily ended the case of him who pleaded it, and he became a competent witness for those who had pleaded "not guilty." He could not be heard in his own defence, or in mitigation of damages. His position was that of a man upon whom the law had spent its force, and whose trial had been severed by a separate conviction.

4. The court below should have given the first charge asked: "that if defendants believed that Bennett's negroes had stolen Burps' hogs, they had a right to search the negro houses of Bennett, if they did not commit a trespass on the property of Bennett. 1. The refusal of this charge is an assertion that, with authority of law, no man can go upon another's premises. If he commits no trespass, he has a right to go, to inquire whether the laws of the country have been violated or not. 2. This court has decided (and I have seen the decision) that any person may arrest a slave upon any criminal charge without a warrant. I have hunted for the decision, and have not been able to find it.

5. The court erred in refusing to give the second charge

asked: "that it is not intended by the law that a warrant should be issued to search a slave or his house, on a criminal charge against such slave." 1. The law of "search warrants" proposes to search *persons* and their houses (see Code, p. 661.) Slaves are not persons, until they are charged, arrested and put on trial for a criminal offence.—See Code 661, § 3776; 54th No. of Federalist. To arrest and search a white man without a warrant, would be a trespass; but not so with a slave, if no violence was committed on his person. The slave and his cabin both belong to the master: and if there is no trespass committed in searching the one, there can be none in searching the other. Either can be done without a trespass upon the family of the owner.

6. The court below erred in refusing to charge "that if the original purpose and intent of the parties, to-wit, searching the negro houses, was, after it was done, approved of and acquiesced in by Bennett, then the defendants were in a new position, and any subsequent act of one of the defendants could not be connected with the said original intent and purpose of the parties." The record shows that after the negroes and their houses had been searched, Burps, who led the party, went with them to Bennett's house, "and stated to Bennett that his slave Josh had stolen two hogs from him, and that he had been searching said Josh's house for the meat; to which Bennett replied, stating that said defendant had done right." The assault and battery was committed but by one of the defendants, and *all* were convicted, upon the ground that they were all responsible for the consequences of "the unlawful" act of search, viz., the assault and battery. 1. The original design was not unlawful, as shown above. 2. Therefore, no one was liable but Hobson Thompson, who struck the blow and pleaded "guilty." 3. If the search *was* unlawful, Bennett's acquiescence in and approval of it made it lawful, as in the beginning it was a mere civil trespass; and Bennett being the prosecutor, whatever affects him affects the State. As *son assault demesne* would be a good defence to a civil action, so it is to an indictment. If, upon the facts, Bennett could not recover damages, the State ought not to convict upon the same facts, because the State would get an advantage of its citizen if it were otherwise.

P. T. SAYRE, with whom was THOS. J. JUDGE, for the Attorney General, *contra:*

The first charge asked was properly refused. It was abstract: there was no evidence showing that the defendants believed that Bennett's negro had stolen the hogs; nor was there any evidence showing that Burps had lost any hogs. The charge was also contradictory, for the search of the negro houses, without consent, was, of itself, a trespass.

The negro houses were the property of Bennett, and they could no more be searched, without legal process, than could his dwelling house; and therefore the second charge was properly refused.

It is a matter of discretion for the court to allow co-defendants to sever, and the exercise of that discretion cannot be reviewed.

The fourth charge was also properly refused. The evidence shows that the defendants were at Bennett's upon a common illegal design; their object had not been accomplished when the blows were inflicted; they all participated in the pursuit of the negro woman; and they are all responsible for what any one of their number did. Bennett's words of approval were spoken before he knew the number, character and object of the parties who were present; and when the assault was committed they were all engaged in an illegal pursuit.

GOLDTHWAITE, J.—The questions raised upon the record as to the sufficiency of the indictment, we regard as settled by the decision in the case of Noles v. The State, at the present term. It is true, that in that case the crime was alleged to have been committed on a day certain, while here the offence, in conformity with section 3512 of the Code, is charged generally to have been committed before the finding of the indictment. The time, however, is not a constituent of the offence; and if the Legislature may declare an indictment good, which does not allege the county in which the offence was committed, as we held in the case referred to might be done, upon the same principle the allegation of precise time may be dispensed with, which, in cases like the present, is entirely immaterial, the defendant having every legitimate

advantage upon the evidence which he could have if it was charged in the indictment.

Neither was there any error in refusing the application of the defendants who pleaded not guilty, to be tried separately from the defendant who pleaded guilty. We held in Hawkins v. The State (9 Ala. 137), that where several were jointly indicted for the commission of a felony, they could not claim separate trials as a matter of right; and the authorities examined in that case show, very conclusively, that applications for a severance, in criminal cases, are always addressed to the sound discretion of the court in which the trial is had, that it does not depend upon the defendants pleading several pleas, and that the exercise of this discretion cannot be reviewed on error. The trial of the defendant who pleaded guilty was not over; it still devolved upon the jury to assess the fine, and the court to pronounce its judgment. If he had not pleaded guilty, we have seen that his co-defendants could not, as a matter of right, have claimed a separate trial, and the mere fact that the jury would be required to look to the evidence, so far as he was concerned, solely for the purpose of assessing the fine, furnishes no sufficient reason to the others to claim a severance as a right, which they could not do had he put in a plea which cast upon the jury the further duty of ascertaining his guilt.

The first two charges requested by the appellants involve the proposition, whether any individual who believes that his property has been stolen by a slave has the right, without process of law, to search his dwelling house upon the premises of his master. We have no hesitation in saying, that this proposition cannot be sustained, either upon principle or authority. The house of the slave is the house of his owner; and the fact that it is used by the former as his dwelling does not change its character, so as to authorize an entry into it as a right, in any case in which an entry could not lawfully be made into the house of the master, except in cases in which the authority is expressly given by law, as in the case of patrols (Code, § 992.) If the law was otherwise, it would necessarily lead to very great abuses; and the case before us, with its accompanying incidents of turbulence, violence and outrage, affords a striking illustration of the consequences

to which the doctrine contended for would lead. It was to avoid such consequences, that the law requires a party, in order to obtain a search warrant, first to make affidavit that his property has been stolen, and to state the grounds of his belief that it is concealed in the place proposed to be searched; and when this is done, it is not left to the party to prosecute the search, but it is conducted by an officer, who is responsible to the law for the proper execution of this duty.—Code, §§ 3774, *et seq.* Unless this is done, the parties invading the premises of the master, or the dwelling of the slave, are trespassers, and amenable to the law for their unlawful act.

The only remaining question arises upon the refusal of the court to give the last charge requested. This charge was, "that if the original purpose of the parties, to-wit, searching of the negro houses, was, after it was done, affirmed and acquiesced in by Bennett (who was shown to be the owner of the slaves), then the defendants were in a new position, and any subsequent act of one of them could not be connected with the original purpose of the parties." It may be conceded, that if the act complained of was committed by one of the party only, and not done in pursuance of the common design, they alone who participated in the act are legally responsible. In other words, to render all liable in such a case, the act must happen during the prosecution of the original unlawful purpose, or within such a time afterwards as to satisfy the jury that it was connected therewith.—1 East Pl. C., c. 5, § 34, p. 259. The true criterion is, whether the act is connected with the general or particular intent with which the parties unlawfully confederated. If it falls within this intent, all are guilty. Upon these principles, if the evidence established that the original design was confined to searching the negro houses, and after that act was entirely over, an assault was committed, our opinion is, that it could not properly be regarded as done in pursuance of the common purpose. But if the evidence conduced to show that the original design of the defendants not only extended to the search, but went further, and contemplated the use of force if opposed or interfered with upon the premises, then the charge was properly refused, for the reason, that it assumes that the common design was limited to the search. The

words are, "if the original purpose, to-wit, the searching of the negro houses, was," &c. The question, therefore, in relation to this charge, depends upon the fact, whether the record discloses testimony tending to prove that the original purpose of the defendants was not confined to the search of the houses, and that the act complained of was within the scope of the common design. That it tends to this conclusion, we all agree. The evidence shows, that while the search was going on, or just as it had terminated, a female slave fled shrieking from the negro house to the chamber of her mistress, pursued by two of the party, who planted themselves beside the door of the room in which she had taken refuge, apparently to prevent her from escaping; and when the owner of the slave (and master of the house) stepped towards the door and attempted to pass in, civilly requesting the defendants to leave his house, that his family might not be disturbed and alarmed, he was assaulted and severely beaten by one of the party, without any of the others offering any assistance, or, so far as the evidence discloses, attempting to interfere by remonstrance or otherwise. Looking to the conduct of the parties, we think the jury might very reasonably have inferred the assent of all to the assault, and that the violence which was then offered entered into the general intent; and if such was the fact, all were guilty. It would make not the slightest difference, that the owner of the premises consented to or acquiesced in the search. The liability of all would result from the force being used in contemplation of the common unlawful purpose; and a charge which confined the intent within a more narrow compass than the evidence tended to establish, would have been incorrect.

Judgment affirmed.

STARR *vs.* THE STATE.

1. The action of the primary courts on applications for continuances, is matter of discretion, and not revisable on error or appeal.
2. When application is made for a continuance on account of absent witnesses, the court, in the exercise of its discretion, may require the other party to admit the truth of the facts proposed to be proved by the absent witnesses, or, merely that those witnesses, if present, would swear to those facts; but an admission that the absent witnesses would swear to those facts, is not an admission of their absolute truth.
3. Under an indictment for trading with a slave, it was shown that the defendant had bought some bricks from the slave, which the latter had stolen from his master; and the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises: *Held*, that the defendant's declarations (made while the witness was examining the bricks), "that the bricks were his, and that he got them from another person's brick-yard," were not admissible evidence for him.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

THE appellant was indicted, at the Fall term, 1853, of the Circuit Court, for trading with a slave, the property of one Benjamin F. Randolph, without the consent of the master, owner or overseer. Before the trial was commenced, the defendant submitted an affidavit for a continuance, on account of absent witnesses; "and the attorney general then stated to the court, that he would admit that the witnesses named in the affidavit would swear to the facts therein stated; and upon this statement the court ruled the defendant to trial."

On the trial, the State proved that the slave named in the indictment was seen carrying bricks to the lot owned by the defendant, on which he resided, and that they were received by the defendant. Said Randolph, the owner of the slave, was then introduced on the part of the State, and he testified, "that he went to the defendant's lot, soon after the charge was made against him, to examine the brick, and there saw some brick which he examined, and which resembled the brick made at his brick-yard, and which he believed from their size were made at his brick-yard; that he knew his

brick as well as his hat; that the defendant was present on the lot when he examined said brick. The counsel for the defendant then proposed to prove, by said Randolph, that the defendant, while witness was examining the brick, stated that the brick were his, and that he got them from Stewart & Wharton's brick-yard. To this evidence the attorney general objected, and the court excluded it: to which the defendant excepted."

After the State had closed its evidence, the defendant's counsel read in evidence to the jury a part of the affidavit made for a continuance, as to the facts to which his absent witnesses would depose; and asked the court to charge the jury, that the State having admitted that his absent witness would swear that the bricks were not Randolph's, but came from Stewart & Wharton's brick-yard, &c., "is an admission that those facts are absolutely true, and ought to be so regarded by the jury in finding their verdict; which charge the court refused to give, and the defendant excepted."

The errors assigned are: "1st, the refusal of the court to allow the defendant to prove his own declarations to Randolph, when the latter examined the bricks; 2nd, the refusal of the court to give the charge asked."

ELMORE & YANCEY, and N. HARRIS, for the appellant:

1. The court below had no right to put the defendant upon trial, on admission by the State that his absent witnesses would swear to the facts stated in the affidavit.—Dominges v. The State, 7 Sm. &·Mar. 477; The People v. Vermilyea, 7 Cowen's R. 389.

2. The admission that the witnesses would swear to the facts stated in affidavit, held to be an admission that they were absolutely true.—7 Sm. & Mar. 477, *supra;* Goodman v. The State, 1 Meigs' R, 196; Wharton's Criminal Law 2nd ed.), 835. Even in civil cases, the adverse party is required, before he can force a trial when a witness is absent, "to admit what it is so alleged such absent witness will swear" (XVIth Rule of Practice, on page 715 of the Code); and if the rule in civil cases is such, the reasons why it should also obtain in criminal cases are much stronger.

3. The defendant's declarations to Randolph were admis-

sible evidence for him.—Nelson v. Iverson, 24 Ala. 10; Brazier & Co. v. Burt, 18 *ib.* 201; *ib.* 343; Perry v. Graham, *ib.* 822; Regina v. Abraham, 61 E. C. L. R. 550; 2 Car. & Kir. 550; 1 Green. Ev. §§ 108, 109; 2 Russell on Crimes, pp. 750 to 752 and notes.

P. T. SAYRE, for the Attorney General, *contra:*

1. The universal practice, in this State, has been, to force a party to trial on the admission that his absent witnesses would swear to a certain state of facts; an admission of the absolute truth of those facts has never been required, for this would be giving greater force to the testimony of the witnesses than it would have if they were examined on the stand. This rule has prevailed in civil and criminal cases; and, even if the construction was originally wrong, *communis error facit jus.*—Maher v. The State, 1 Porter 268; Powell v. The State, at the present term; P. & M. Bank v. Willis, 5 Ala. 779; 3 A. K. Marsh. 467.

2. The defendant's declarations to Randolph were properly excluded, because they were made after the alleged commission of the crime.—State v. Scott, 1 Hawks 24; State v. Hildreth, 9 Ired. 440; State v. Scaggs, 8 S. & M. 722; State v. Wisdom, 8 Porter 511; State v. Campbell, 23 Ala. 79.

CHILTON, C. J.—1. We have uniformly held, that the granting or refusing of continuances is a matter resting in the sound discretion of the primary courts, and as such not revisable on error in this court. That the solicitor was put upon the admission of what the defendant's absent witnesses would swear, was for the defendant's benefit; and he ought not to be heard to complain, that the court, in the exercise of a discretionary power, superadded a condition for his advantage, which it might have omitted altogether, without committing an error for which its judgment could have been reversed.

2. As to the effect of the admissions by the State, we think it was for the court, in the exercise of its discretion, to declare whether the admission should go to the facts proposed to be proved, or merely that the witness, if present, would swear to what the affidavit states he would. We will not

undertake to say, that there may not be cases, where the court should extend the admission so as to make it conclusive; but in most cases, it will subserve the purposes of justice, merely to require the admission that the witnesses, if present, would swear to what is stated, leaving the proof to depend upon the credit due to the witnesses, and subject to be rebutted. The admission in the present case was of this character, and not that the facts were absolutely true as stated in the affidavit. There was, therefore, no error in refusing the charge prayed for by the defendant in the court below.

3. As to the declarations of Starr, made when Randolph was examining the brick: We entertain no doubt that they were properly excluded. There was no question as to the fact whether he claimed the brick as his own or held in right of another. The question was, whether he had bought them from John, the slave of Randolph. If the accused could thus make evidence for himself, by declarations as to the manner in which he acquired the property, it would be difficult to determine where such proof should end. Besides, the declarations here proposed go much beyond any case we have seen predicated upon the doctrine of being portion of the *res gestæ*. They are not merely explanatory of the possession, but go on to show how the brick were acquired—that is, the defendant seeks to prove a *past* transaction by his declarations, thus deducing a title to the brick as having obtained them from Stewart & Wharton's brick-yard. What was the thing done, of which these declarations can be considered part? Randolph was examining the brick. It does not appear that he had made any charge against Starr, in reference to the brick, requiring a response lest silence should be construed into an admission of the charge or a circumstance adverse to him. Nothing of this kind is stated; but the declarations rest solely upon the ground that a party in possession of property may, by his declarations, show how he had acquired it. The rule has never been extended thus far. See Perry v. Graham, 18 Ala. 822, and the cases there cited.

There was no error in the several rulings of the court, and the judgment is affirmed.

ELAM *vs.* THE STATE.

1. An indictment (under § 1059 of the Code), which charges that the defendant, before the finding of the indictment, "sold spirituous liquor, without a license, and contrary to law," is sufficient; and under it the defendant may be convicted, on proof, of selling to a person of known intemperate habits.
2. To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient.
3. Whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the jury upon the evidence; and a charge which assumes that such knowledge was brought home to him, is erroneous.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

THE indictment in this case, found at the September term, 1853, of the Circuit Court, is as follows: "The grand jury of said county charge, that, before the finding of this indictment, John Elam sold spirituous liquor, without a license, and contrary to law, against the peace and dignity of the State of Alabama."

The defendant demurred to the indictment, but his demurrer was overruled; and on the trial, he was convicted, on proof of selling to a person of known intemperate habits.—He moved to exclude from the jury all the evidence adduced by the State to prove the known intemperate habits of the person to whom the liquor was sold (for which see the opinion); but the court overruled his motion, and he excepted.—The court charged the jury, that, if they believed the evidence, they should find the defendant guilty; to which charge the defendant excepted.

E. W. PECK, for the appellant:

1. The indictment is bad for uncertainty: it does not state the facts constituting the offence in such a manner as to

enable the defendant to know what particular offence was intended.—Code, §§ 3501, 3502.

2. If the indictment charges an offence, it must be so stated as to inform the court what punishment is to be inflicted.—Now, on a plea of guilty, what is the penalty to be inflicted? is it $60, $75, $40, or $30?—Code, §§ 397, 399.

3. To sell spirituous liquors to a person of known intemperate habits, is not the subject of a license.—Code, §§ 397, 399. Sections 1058 and 1059 must be construed in connection with the other parts of the Code, and so as to harmonize all its provisions on the particular subject. See, also, our bill of rights, on page 30 of the Code, sections X and XI.

4. The evidence should have been excluded under this indictment, because (1) of the uncertainty of the indictment, and (2) because it was not proper evidence to prove the character of McDowell as a man of known intemperate habits.

5. The charge was erroneous, because it withdrew from the jury the decision of the question whether the knowledge of McDowell's character was brought home to the defendant.

M. A. Baldwin, Attorney General, *contra*.

LIGON, J.—The indictment in this case is drawn in strict conformity with the directions given in the Code (§ 1059), and is therefore sufficient. Under such an indictment, the defendant may be called on to answer for any violation of the law concerning retailing which may be proved against him on the trial. We have already held, upon the fullest consideration, that when the Code prescribes a form, or specially directs what shall be charged in an indictment for a particular class of offences, the proper course is, for the pleader to adopt the form, or pursue the special directions thus given.—Noles v. The State, at the present term. The general rules governing indictments (§§ 3501 and 3502 of the Code), were designed for indictments in relation to which no form is given, or special rules prescribed in the Code.—Noles v. The State, *supra*. The demurrer to the indictment in this case was correctly overruled.

An examination of section 1058 of the Code, shows what persons are included under the title of retailers; and from it,

also, we may readily perceive what offences can be proved under an indictment framed in reference to the directions given in section 1059. Three classes of persons are retailers within the meaning of the law, and neither is allowed to retail without a license: first, one who sells spirituous or vinous liquors in quantities less than a quart; second, persons who sell such liquors by the quart to a person of known intemperate habits; third, those who sell, in any quantities, to be drunk on or about the premises. If either of these sell, without a license, he is liable to be proceeded against as prescribed in section 1059; and on such indictment, if he is proved to have sold liquors in less quantities than a quart, or by the quart to a person of known intemperate habits, or in any quantity to be drunk on the premises, he may be convicted. Such an indictment puts in issue every violation of the law relating to retailers; and is equivalent to one containing separate counts for every possible violation of those laws.

It is contended, however, that the proof shown in the bill of exceptions is not sufficient to warrant the conviction, and should have been excluded by the court, when the motion was made for that purpose. The proof, thus objected to, shows that the defendant sold spirituous liquors to one James McDowell, by the quart and the half-gallon, but not to be drunk on the place. It was further proved, by a number of witnesses residing in his neighborhood, and who had known him for several years, that McDowell was a man who was in the habit of drinking spirituous liquors to excess; that they had often seen him drunk at different times and places, so drunk as to stagger and fall on the ground; that his *habit* was to get drunk whenever and wherever he could get the liquor to drink; that he had been known to leave his house and work several days at a time, and having a jug of liquor with him to remain drunk in the woods. It was further in proof, that McDowell had lived near the defendant for a number of years; that the defendant knew him well; that on the 4th of July preceding the finding of the indictment, he was drunk at the defendant's house; that McDowell was well known in the neighborhood as a man of very intemperate habits, and that the defendant kept liquor for sale and had no license.—**The bill of exceptions does not show that there was any con-**

flict in the testimony, or that any proof was made in the defence. It shows, however, that after the proof on the part of the State had been given, the defendant objected to it, and moved to exclude from the jury that portion which tended to prove that McDowell was a man of known intemperate habits; but his objection and motion were overruled by the court, and he excepted. The court charged the jury, "that, if they believed the evidence, they should find the defendant guilty." To which charge the defendant also excepted.

We can perceive no error in the action of the court on the motion to exclude the testimony in relation to the intemperate habits of McDowell. The witnesses say they live in his neighborhood, and have done so for years; that McDowell's habits, in this respect, are well known to them, and in the neighborhood generally; and that his habits are *very* intemperate, and have been so for several years, during which time he was the neighbor of the defendant, and *well known* to him. It is necessary, in our opinion, before a witness should be allowed to prove the general character of a person, in respect to his habits, that the witness should state that he was acquainted with the general character of the party in the particular to which he deposes; but, if his testimony shows that he has such an acquaintance as authorizes him to speak to the point in controversy, this will be sufficient, whether his knowledge in this behalf is brought out on a preliminary examination, or during his examination in chief. In this case, the witnesses depose, that they are and have been the neighbors of McDowell; that they know his character for intemperance; and that he is a man of known intemperate habits. This is sufficient to show that he fills the character to whom the unlicensed retailer is forbidden to sell, and to whom, if he does sell, it will be in violation of law.

The testimony, in this case, was properly allowed to go to the jury; and if the defendant had desired to weaken its force, or destroy its conclusiveness, he should have done so by addressing such inquiries to the witnesses examined by the State, or others, as would tend to show that their opportunities of knowing the habits of McDowell, in respect to his intemperance, were not such as to enable them to speak of them.

This proof should, however, have been left to jury, for

them to say whether, from the facts proved, the defendant knew the habits of McDowell at the time he sold to him. His knowledge, we think, might well be inferred from the testimony, which shows that he had ample opportunity to know the habits of his customer; but this is an inference of one fact from the existence of another, or an inference of fact, which the jury had the only right to draw. The charge of the court assumes, that a knowledge of the intemperate habits of McDowell had been brought home to the accused, and upon this assumption directs the jury that his guilt was made out, if they believed the testimony. This is erroneous. Knight's Adm'r. v. Vardeman, at the present term; 22 Ala. 469.

Let the judgment be reversed, and the cause remanded.

MORRIS *vs.* THE STATE.

1. Section 2355 of the Code does not deprive the court of the right to give explanatory charges after having given the charge asked in writing; on the contrary, it is the duty of the court to simplify and explain the charge given, by such additional instructions as will prevent a misunderstanding or misapplication of it.
2. When an affirmative charge is given, which asserts a correct abstract proposition of law, it will be presumed, on error or appeal, to have been justified by the evidence, unless the proof is set out in the bill of exceptions.
3. When a party excepts to the refusal of the court to give a charge asked, he must set out in his bill of exceptions sufficient of the evidence to show that the charge was not abstract.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. NAT. COOK.

WATTS, JUDGE & JACKSON, for the appellant.

P. T. SAYRE, for the Attorney General, *contra.*

CHILTON, C. J.—Thomas Morris, the prisoner, was indicted for an assault with intent to murder Matthias Brown;

pleaded not guilty, was tried, convicted, and sentenced to five years' imprisonment in the penitentiary.

It appears by the bill of exceptions, that two charges were asked in writing, one of which asserted, that if the defendant inflicted the wound and was not actuated by malice, but did it in the heat of passion, then, as it would not have been murder had Brown died, the prisoner could not have been guilty of an assault with intent to murder. The court gave this charge, with the qualification, that to excuse the prisoner on the ground of passion, there must have been reasonable cause for such passion. The court gave the charge as asked, but superadded an explanation or qualification, as to the reasonableness of the provocation. This is a compliance with section 2355 of the Code, which was not designed to deprive the court of the right to give explanatory charges, after giving the charge as prayed for. Indeed, it is the duty of the court to see to it that the jury are not misled by any charge which is given, but so to simplify and explain the charges which are given, by additional instructions, as to prevent misunderstanding or a misapplication of them.

None of the facts are set out in the bill of exceptions, and it is impossible for us to determine whether the explanation or qualification is correct or not. If the prisoner had seized a gun, and shot at Brown, evidently with intent to take his life, but missing of his aim had only wounded him, having used a deadly weapon, if death had ensued, the law would have implied the malice, and the onus of showing such provocation as would have reduced the killing to manslaughter would have been thrown upon the defendant. Assuming that such a weapon was used, for the sake of the argument in this case, and that the State had proved it, it would then have devolved upon the prisoner to show, if he sought to protect himself in consequence of excited passion, some reasonable ground or excuse for becoming excited. The provocation must be such as may reasonably be supposed to excite and throw the prisoner off his guard,—as temporarily to dethrone his reason.—No one would contend, that for a trifling provocation the accused might seize a deadly weapon, and purposely take the life of the person giving the provocation with it, and throw himself upon the infir -ty of his nature to redu uch killing

to manslaughter. Hence the books agree, that "no words of reproach, however grievous,—or indecent provoking actions, or gestures expressive of contempt or reproach, without assault upon the person, however irritating, are sufficient to free the party killing from the guilt of murder: certainly not, where he makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm."—1 Russell on Crimes, 486; Archb. Cr. Pl. 226. The proof not being set out in the bill of exceptions, we must presume the facts justified the charge given by way of qualification. This is an answer, also, to the argument that the jury might have inferred from the charge that they could look alone to the proof made by the prisoner, to see whether there was reasonable cause or provocation for the act, and that they should disregard the proof made by the State which might conduce to show this. We cannot presume, in order to put the court in error, that the State made any such proof.

2. As to the charge refused, which asserted "that if the jury believed from the evidence that the witness Key swore falsely in any one material matter on the trial, they must set aside his testimony entirely": We cannot say there is error, without assuming the existence of facts nowhere shown by the record; and the rule is, to indulge no presumption adverse to the regularity of the proceedings in the primary court. For aught we can know, Key may have been the prisoner's witness. Again; there may not have been the semblance of foundation furnished by the evidence, that he had sworn falsely in any particular. The party excepting to the refusal of the court to charge must set out sufficient of the facts, or of the proof in the cause, to show that the charge was not abstract. Where the court gives an affirmative charge, then we must presume there was evidence on which to base it; and if it be erroneous as an abstract proposition of law, we must reverse, unless it is clear from the record that no injury could possibly have resulted to the appellant.

There being no error in the affirmative charge in this case, and the charge refused being abstract so far as this record discloses, it remains but to affirm the judgment.

Judgment accordingly.

BURDINE *vs.* THE STATE.

1. An indictment (under the Code) for gaming charged, that the defendants "played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted: *Held*, that the indictment was sufficient on demurrer, and was not violative of the tenth section of the first article of the State constitution.
2. A lawyer's office, during the session of the Circuit Court, is not a "public place" within the statute against gaming; the playing having taken place at night, by permission of the person who occupied the room as a sleeping apartment, when the doors were locked, and the curtains drawn over the windows.

APPEAL from the Circuit Court of Pickens.
Tried before the Hon. ALEX. B. CLITHERALL.

THE indictment in this case was as follows:

"THE STATE OF ALABAMA, } *In the Circuit Court,*
Pickens County. } Spring Term, 1854.

"The grand jury of said county charge, that, before the finding of this indictment, Stephen D. Swallow, D. W. Hunley, James T. Burdine, James A. Sanders, and John H. Thomas, played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were, at the time, retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted; against the peace and dignity of the State of Alabama."

The defendant Burdine, being on trial alone, demurred to the indictment; and his demurrer being overruled, he then pleaded not guilty. The evidence showed, that the defendant had played at cards, on two occasions, in the law office of a practicing attorney in the town of Carrolton; that the playing took place on Monday night of the first week of the Circuit Court, and on the Tuesday or Wednesday night following,

by permission of the young man (a minor) who slept in the room; that the doors were locked, and the curtains drawn over the window; and that no person passed in and out of the room during the playing, except the occupant of the room. The court charged, that this room was a public place within the statute, and the defendant excepted.

The overruling of the demurrer to the indictment, and the charge of the court, are now assigned for error.

S. F. HALE and A. A. COLEMAN, for the appellant:

1. The indictment is fatally defective. The tenth section of the first article of our State constitution provides, that "the accused, in all criminal prosecutions, has the right to demand the nature and cause of the accusation against him." The Code (§ 3497) defines an indictment to be "an accusation, in writing, presented by a grand jury to the Circuit Court, charging a person with an indictable offence"; while section eleven of the first article of the constitution declares, that no person can be put upon his trial on a criminal charge, until he is first indicted by a grand jury. All these provisions are violated by putting a party on his trial on this indictment. He is not informed by it of the cause of the accusation against him; he cannot tell from it whether he is to be tried for playing a game of cards, *or* a game of backgammon, with dice, *or* at some device or substitute therefor; nor can he tell whether he is accused of playing any one of these games at a tavern, *or* a storehouse for retailing spirituous liquors, *or* at some other public place, *or* at an outhouse where people resort. The constitution surely does not mean, that the defendant, instead of being furnished with the particular cause of the accusation against him, should be furnished with some *half-dozen causes in the alternative*, and told that he is to be tried on some one of them, and left to guess which one. It is no answer to this objection, to say that all of the offences charged are of the same grade, and all subject the party, if found guilty, to the same punishment. The object of the constitution is, that the party put on his trial shall have notice of what particular act he is called on to defend. Surely, no court would hold an indictment good, which charged that the defendant, with malice aforethought, had taken the life of A, or

B, or C, although the offences are all of the same grade, and subject the defendant to the same punishment.—Murphy v. The State, 2 Cushm. 590.

Again; no one can be put upon his trial for a criminal offence, unless he is first charged therewith by a grand jury. The defendant, in this case, has been tried and convicted of playing at cards in a public place; but we defy any court to say, from an inspection of the indictment, that the grand jury charged him with that offence: the only charge made by the grand jury was, that he had either played at cards, *or* at dice, *or* at some device or substitute therefor, *either* at a public place, *or* at some other place prohibited by the statute; that is, the grand jury charged, that he had either committed the offence of which he was convicted, *or* some other offence of the same grade. To hold that a conviction can be had on such an indictment, is to hold that the sacred, constitutional rights of the citizen may be frittered away by hasty, inconsiderate legislation, or mere judicial construction.

2. The charge of the court was erroneous.—Clark v. State. 12 Ala. 492; Coleman v. State, 20 Ala. 51.

P. T. Sayre, for the Attorney General, *contra*.

GOLDTHWAITE, J.—The form of the indictment is in accordance with section 3506 of the Code, which provides, that where offences are of the same character, and subject to the same punishment, the defendant may be charged with the commission of either in the same count, in the alternative. The objection to this provision, urged on the part of the appellant, is, that it is in violation of the tenth section of the first article of our bill of rights, which entitles the accused to be informed of the nature and cause of the accusation, and to have a copy thereof. The object of this clause of the constitution was, to enable every person, against whom a criminal prosecution was instituted, to defend himself against it if innocent; and a due regard to the intent and spirit of this provision would require us to pronounce against any indictment, whatever might be its form, which was obviously insufficient to secure this result. But the fact that the defendant may be charged with the commission of one or the other of

two or more offences, which are specified with legal certainty in the indictment, does not render him the less able to defend himself against either of the charges which are alleged. It is true, that he may be required to meet each one of the offences; but he would have been obliged to do this, if the indictment, instead of pursuing the form used, had been framed with different counts, alleging the commission of all the offences which are here charged in the same count. We do not think that any constitutional right of the defendant can be impaired by sustaining the indictment in its present form.—Noles v. The State, at the present term (24 Ala. 672.)

As to the charge of the court: The evidence established, that the playing took place in the night time, during the session of the Circuit Court, in a lawyer's office, and by permission of a person who occupied the room as a sleeping apartment; that the doors were locked, and the curtains drawn over the windows. The court charged, that this was a public place, and, as we think, erroneously. We held in Clark v. The State, 12 Ala. 492, that the office of a physician, where the playing was at night by invitation, was not a public place within the meaning of the statute against gaming; and there is no difference, in principle, that we can discover, between the two cases.

Let the judgment be reversed, and the cause remanded.

NOTE BY THE REPORTER.—The case of Sanders v. The State, also from Pickens Circuit Court, was reversed and remanded on the authority of Burdine's case; the playing in each case having taken place in the same room, and under the same circumstances.

LODANO *vs.* THE STATE.

1. When an offence is created and fully defined by statute, it is sufficient to charge it in an indictment in the words of the statute.
2. The useless repetition of words in an indictment does not vitiate it, but the superadded words may be rejected as surplusage.
3. The Legislature is not restricted by the State constitution from imposing such conditions as may be deemed proper and required by the good of the community, upon those who are allowed to retail spirituous liquors, both as regards the persons to whom and the quantities in which they may sell.
4. A free person of color, whose mother was an inhabitant of Mobile when the territory was ceded by Spain to the United States, is included in the act of 1852 (Pamphlet Acts 1851-2, p. 80), prohibiting the sale of spirituous liquors to free persons of color.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE defendant was indicted for retailing spirituous liquors to a free person of color. The indictment is as follows: "The grand jury of said county charge, that, before the finding of this indictment, Giobbe Lodano did retail or sell to John Jones, otherwise called Budd, then and there a free person of color, did then and there sell or retail spirituous liquors, against the peace and dignity of the State of Alabama."

The defendant demurred to the indictment, but the court overruled the demurrer, and he then pleaded not guilty. On the trial the defendant proved, that Jones or Budd, to whom the liquors were sold, was the child of a free woman of color, who was an inhabitant of Mobile before and at the time when the territory was ceded to the United States; that both she and his father, who was a negro, had always been free. On this proof the defendant asked the court to instruct the jury, "that, if they believed from the evidence that the person named John Jones, or Budd, in the indictment, was a free person of color, and that he was a descendant of an inhabitant of this territory at the time of the treaty between Spain and the United States, then they cannot find the defendant guilty, although they may be satisfied from the testimony that he

retailed or sold spirituous liquors to said John Jones, *alias* Budd." This charge the court refused, and the defendant excepted.

It is here insisted, that it was error to overrule the demurrer, and to refuse the charge.

PERCY WALKER, for the appellant:

1. The demurrer should have been sustained, because the indictment was wanting in requisite certainty.

2. The charge asked should have been given. The evidence showed, that the mother of the person to whom the liquor was sold was an inhabitant of Mobile when the territory was ceded by Spain to the United States. The sixth article of the treaty of cession (U. S. Statutes at Large, 8th vol., pp. 256, 258) is as follows: "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal constitution, and admitted to the enjoyment of all the privileges, rights and immunities of the citizens of the United States." In view of this treaty stipulation, our Legislature has, at various times, by express enactments, declared that our penal laws, relative to slaves and free persons of color, are not applicable to the "inhabitants" of these ceded territories, or their descendants. This can be seen by a reference to our old statutes prohibiting the education of slaves; and the latest legislative acknowledgments of their exemption may be found in the Code (§§ 1033, 1034, 1035, 1036, 1037.) If a descendant of a free person of color, who was an inhabitant of Mobile at the time of the treaty, has the right to retail spirituous liquors (as admitted by section 1037 of the Code), it follows, that he cannot be deprived of the right to buy at retail so long as other citizens are permitted to do so, and that no penalty can be enforced against a white person for selling to him. Independent of legislative recognitions of the rights of this class as citizens, they have been too often admitted by the Federal and State courts to require argument. These rights are secured by the treaty, and cannot be destroyed or diminished by any State tribunal. The *status* of the person to whom the liquor was sold, is determined by

that of his mother, and it is immaterial to what race his father belonged.

M. A. BALDWIN, Attorney General, *contra:*

1. The indictment is sufficiently certain and intelligible. The repetition of some of the words is mere surplusage, and may be stricken out without vitiating the instrument.

2. The statute, under which the indictment was framed, makes no exception of any particular class of free persons of color. The presumption is, since there is no exception, that it was not intended to exempt this class of persons.

LIGON, J.—There was no error in overruling the demurrer. The indictment is evidently framed under the act of the 9th of February, 1852 (Sess. Acts 1851-2, p. 80), which enacts, that "it shall not be lawful for any person or persons to retail or sell, in any quantity, spirituous liquors to any free person of color." It has been frequently held, that, when an offence is *created* and fully *defined* by a statute, it will be sufficient to charge it in the words of the statute. Such is the case in the present indictment; and the mere fact that the words "then and there did retail and sell" are uselessly repeated, does not affect it in any way, as, on their recurrence, they are surplusage, and may be struck out without injury to the indictment.

The charge asked was properly refused. The Legislature of this State is not restricted by the constitution from imposing such conditions as they may deem proper, or as in their opinion the good of the community may require, upon those who are allowed to retail spirituous liquors, both as it regards the persons to whom they may sell, and the quantities in which they may be sold. This power, in some form, has been constantly exercised in the license laws of this State. The retailer has never been allowed to sell his liquors to persons of known intemperate habits, nor, for many years past, could he sell to students, minors or slaves, unless it was done under certain restrictions imposed by law. But it is insisted, that inasmuch as John Jones, to whom the sale was made in this case, is a descendant of a woman of color, who was an inhabitant of Mobile under the Spanish rule, and as such included in the sixth article of the treaty by which Spain ceded that

city and the adjacent territory to the United States, which reserves to persons of his class greater rights than belong to others of the same class in other portions of the State, therefore, when the terms "free persons of color" are used in our statutes, they are not included unless specially named. Such is not the rule by which statutes should be interpreted. When a generic term is used, without any words of restriction in the statute itself, it includes every species which belongs to it; and in order to exempt the free persons of color protected by the treaty of cession from Spain to the United States from being included in the act of 1852, it should have been declared in the act itself that the terms used in it should not apply to them. Such is not the case, and we have no hesitation in saying, that it is as much a violation of that act to sell to one of them, as to any other free person of color in the State.

There is no error in the judgment, and it is consequently affirmed.

AGEE *vs.* THE STATE.

1. An indictment under the act of February 12, 1850 (Pamph. Acts 1849—50, p. 49), which charges that the defendant sold spirituous liquor to a slave, "without the consent of the master, overseer, *or agent of such slave*," is fatally defective.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. THOMAS A. WALKER.

WM. M. BROOKS, for the appellant.

M. A. BALDWIN, Attorney General, *contra.*

GOLDTHWAITE, J.—This was an indictment found in the spring of 1852, under the section of the act of 12th of February, 1850 (Acts 1849—50, p. 49), which is in these words: "That it shall not be lawful for any licensed retailer,

or other person, to sell to any slave any spirituous or other liquors whatever, except such spirituous liquor be for the use of the owner, overseer or agent, and be so expressed to be in a written permission, specifying the quantity, previously given to such slave." The statute is awkwardly drawn, but it is clear enough, that under this section the material allegation is, the selling liquor to a slave without the written permission of the owner, overseer, or agent of the owner of such slave, expressing that it is for the use of such owner, overseer, or agent, and specifying the quantity of liquor to be sold. In indictments upon statutes, the rule is, that the circumstances which constitute the definition of the offence in the act, must be so stated as to bring the defendant precisely within it.—1 Chit. Cr. Law, 282. The charge in the present case is, the selling of liquor to a slave, &c., "without the written consent of the master, overseer, or agent *of such* slave, expressing," &c. Now as a slave cannot have an agent, unless the expression "agent of said slave" means agent of the owner, it means nothing. But, in indictments, we are not at liberty to resort to intendments; certainty to a *certain intent in general* is required (1 Chit. Pl. 214); and the statement of the offence must, of itself, bring the case within the statute. If the defendant has a right to sell to a slave with the consent of the agent of the owner given in the mode, and according to the terms of the statute, the indictment, to be good, must negative the fact of such consent, which it does not do in the present case, with that degree of certainty which is required by the rules of criminal law in force before the adoption of the Code.

Judgment reversed, and cause remanded.

ARNOLD, ET AL., *vs.* THE STATE.

1. The judge of the City Court of Mobile has power to take a bond conditioned that the principal obligor "make his personal appearance before the City Court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder."

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

BARNEY ARNOLD was indicted, at the December term, 1851, of the City Court of Mobile, for an assault with intent to murder, and, on being arrested, entered into bond with William Fisher and W. L. Nunnallee as sureties, conditioned that he should "make his personal appearance before the City Court of Mobile, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder, and that he depart not thence without the leave of the court." At the July term, 1852, a judgment *nisi* on this bond was rendered against all the obligors; on which a *scire facias* was issued, which was returned executed as to the sureties, and not found as to the principal; and after two returns of not found as to the principal, the judgment *nisi* was made final as to all the parties. It appears that a motion was made at the October term, 1852, before the rendition of the judgment final, "to quash the bond and *scire facias* for defects apparent on the same"; but the record nowhere shows what disposition was made of the motion, and the judgment entry recites that "the defendants came not, but made default." No errors are assigned on the record.

P. T. SAYRE and J. Y. BLOCKER, for the appellant.

M. A. BALDWIN, Attorney General, with whom was P. HAMILTON, *contra*.

CHILTON, C. J.—Upon an examination of the statutes, we entertain no doubt that the power to take the bond for the

appearance of the appellant is conferred upon the judge of the City Court.

The fourth section of the act of 1846 (Pamphlet Acts, pp. 30, 31) confers general criminal jurisdiction upon the City Court, co-extensive with the Circuit Court of Mobile, and declares that "the judge of said court, herein provided for, shall be a conservator of the peace in Mobile county, and as such, and in the exercise of the jurisdiction hereby conferred, shall, in the recess or vacation of said court, have the same power and authority as the judges of the Circuit Courts." The judges of the Circuit Courts had the power to take such a bond as the one in question; and we are not permitted to doubt that the clear intention of the Legislature, in the clause of the statute above quoted, was to confer a similar power upon the judge of the City Court.

We deem it unnecessary to notice the other statutes referred to.

Let the judgment of the City Court be affirmed.

UNDERWOOD *vs.* THE STATE.

1. To support an indictment under section 3108 of the Code, the accusation must be the moving cause of the assault: if the assault was committed upon the provocation that the person assaulted had whipped the defendant's son, the defendant would be guilty of an assault and battery, but not of the statutory offence.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. ALEX. B. CLITHERALL.

THE indictment in this case was found at the Fall term, 1853, of the Circuit Court of Sumter, and charged "that, before the finding of this indictment, William Earbee and Ira J. Underwood did abuse, whip, or beat John N. Strait, upon an accusation that he had been guilty of beating Harry Earbee." The bill of exceptions states, that "the State proved

facts tending to show that the defendant and William Earbee met the prosecutor, Strait, on the day mentioned in the indictment, in the public road, a few miles from Livingston; that Earbee, when they met, accosted Strait, and asked him if he was the man that beat Harry Earbee; that Strait said, he was; that defendant, about the same time, spoke very abusively to Stait, and told him he had threatened to waylay and kill him; that Earbee then told Underwood to strike Strait, which he did, with a large stick, two or three times, inflicting severe injury upon his arm; Strait dodging and trying to get out of the way, and Underwood following him up; that Earbee had, all this time, a double-barreled gun in his hands, pointing in the direction of Strait; that while this was going on, a third person came up and begged Underwood to desist, but Earbee pointed the gun towards him, and told him threateningly not to interfere. Harry Earbee was shown to be a minor son of William Earbee; and there was evidence tending to show a pre-concert between Earbee and Underwood to make this attack on Strait. The court instructed the jury, that, "if they believed that this attack was made on Strait, and he was beaten as above stated, and that this was by pre-concert between Earbee and the defendant, then they might find the defendant guilty under section 3108 of the Code; to which charge the defendant excepted," and which he now assigns for error.

T. Reavis, for the appellant.

M. A. Baldwin, Attorney General, *contra*.

GOLDTHWAITE, J.—The section of the Code on which the indictment was framed, reads thus: "All persons, to the number of two or more, who abuse, whip or beat any person, upon any accusation, real or pretended, or to force such person to confess himself guilty of any offence," &c.—Code, § 3108. To make out the offence contemplated by the first part of this section, it is essential that the accusation should be the moving cause of the abuse or violence. The term "accusation" must not be confounded with the act on which it is based. It means something distinct from, and independent of it. If two persons were to bring a charge against a third, and beat

him upon provocation of the act complained of, that is very different from inflicting the same violence upon him, not from the provocation of the act itself, but because they believed him guilty of the accusation brought against him, for the commission of it. The one is simply an act of private vengeance, while the other implies, to some extent, the usurpation of legal authority—to try and punish upon a charge—what is commonly called lynching.

In the present case, if the violence used towards the prosecutor was upon the provocation that the son of one of the parties had been whipped by him, the defendant would have been guilty of an assault and battery, but not of the statutory offence; while, on the other hand, if the accusation was the cause, then a conviction on the indictment would have been proper. The charge of the court was erroneous, for the reason that it did not observe the distinction we have noticed.

Judgment reversed, and cause remanded.

Ex Parte ELSTON.

1. Mandamus from the Supreme Court does not lie to compel the Circuit Court to vacate an order suppressing a deposition.

Motion for a *mandamus*, or other remedial writ, to compel the Circuit Court of Talladega to vacate an order suppressing a deposition, which had been taken by the petitioner in a certain cause, pending in said court, between himself and the Bank of Brunswick, and had been suppressed because "it was not taken in conformity to law and the rules of the court."

Morgan & Martin, for the motion, cited the following cases to show that the writ of *mandamus* should be granted: Stephenson v. Mansony, 4 Ala. 315; Cuthbert v. Lewis, 6 *ib.* 268; Cullum v. Smith & Conkling, 6 *ib.* 625; 13 *ib.* 722; 5

Wend. 114; Parsons v. Boyd, 20 Ala. 122; 1 Stew. 190; Spence v. Mitchell, 9 Ala. 744.

HILLIARD & THORINGTON, *contra.*

PER CURIAM.—The motion cannot be granted. It is true, this court has a general superintendence and control over inferior tribunals; and it may be that the court committed an error in suppressing the depositions—a point which we do not now decide; yet we should be sorry if, at every step taken in a cause in the primary court, which a party supposes to be incorrect, an appeal would lie to this court to revise its action. Our primary courts would be embarrassed beyond endurance, and our own terms would, in a great measure, be consumed in the argument of points raised upon the preliminary action of the inferior courts. The office of a *mandamus* is too well settled in the case of Edward Henry *Ex parte*, at this term, and *Ex parte* The City Council of Montgomery, 24 Ala. 98, to require further illustration. These cases show, that the case presented is not one which justifies the interposition of this court. The court below has not refused to act—has not repudiated its jurisdiction—but has, it is alleged, committed an error which is injurious to the petitioner. This error, if it be one, can be revised on appeal, when the cause shall have been finally disposed of; and if, in the meantime, the witness should die, as has been suggested, this will not prevent his deposition from being read should it be legal; and if, being illegal, the counsel choose to plant themselves upon the question of law involving its correctness, and prefer testing it to retaking the proof, and should, by the delay, be deprived of the deposition from death or otherwise, this would be a misfortune consequent upon unavoidable accident, against which no provision can be made.

The motion must be denied.

Ex Parte SMALL.

1. When a non-resident is arrested under a bail writ, and compelled to give bond to keep out of jail, *mandamus* from the Supreme Court does not lie to compel the Circuit Court, on its refusal, to discharge the bail.

Motion for *mandamus* to the Circuit Court of Macon.

Geo. W. Gunn, for the motion :

Mandamus is the proper remedy to compel all inferior tribunals to perform the duties required of them by law, and to execute that justice to which a party may be entitled.—Strong, Petitioner, 29 Pick. 484 ; Carpenter v. Bristol, 21 *ib.* 258 ; 6 Bacon's Abr. 434, 435, 436, 438 ; Marbury v. Madison, 1 Cranch 137 ; Dur v. Judges, 3 H. & M. 7; Street v. Gallitin Co. Commissioners, Brees. 25 ; *Ex parte* Remson, 23 Ala. 17 ; and is liberally interposed for the benefit of the subject and the advancement of justice.—6 Bacon 418. Thus, when a motion is made to quash a bond for costs, which was insufficient, and the Circuit Court overruled the motion, it was held that a *mandamus* would lie.—Barnett v. Warren Circuit Court, Harden's Rep. 172.

2. Bail process is an extraordinary remedy, given by statute, and the party invoking it must bring himself within the letter of the statute.

3. At common law, when the summons fell into disuse, and the *capias* became the leading process, it was thought hard to imprison for a contempt, which was only supposed, and in ordinary cases, by the general indulgence of the courts, could only be served with a copy of the writ ; and if he failed to appear, the plaintiff could put in common bail, and proceed with the case, and special bail could not be required without affidavit.—3 Black. Com. 287.

4. Our statute authorizing bail in civil cases, should be strictly construed for three reasons : 1st, because it is in derogation of the common law.—3 Black. Com. *supra ;* 2nd, because it is against liberty.—Jennings v. Sledge, 3 Kelly

128 ; 3rd, because it extends or enlarges the power of a ministerial officer of the court.

5. Parties can only be held to bail in the county of their residence (Code, § 2175) ; and the form of section 2182, that the defendant be discharged upon affidavit, that the particular fact sworn to by the plaintiff is untrue, and that he has no property in the State of Alabama to satisfy the debt, seems conclusive that the Legislature intended to exclude than include non-residents.—5 Ala. 130.

6. The case then stands as at common law, by which bail could not be required, when the demand was unliquidated.—1 Bacon's Abr. 543, Bail in civil cases, B. 2, 1, when demand is uncertain. But if bail could have been required at all, the judge should have made the order ; the clerk had no such power.—Bacon's Abr. *supra*, and cases cited.

7. The affidavit in this case is wholly insufficient ; the statute and the general law each require that the facts should be set out in the affidavit to enable the judge or clerk to fix the amount of bail. The plaintiff should have stated the amount of his damages in positive terms, as well as set forth the material facts of the case.—Pentinger v. Williams, 1 Brown 206; Swan v. Kingston, *ib.* 33; Lewis v. Breckinridge, 1 Blackf. 112 ; 8 East 364 ; 2 East 453 ; Bacon's Abr. *supra;* 3 Kelly 128 ; 10 Bingh. 334. The affidavit should have shown, not only that defendant warranted the slave, but that the plaintiff had been damaged more than fifty dollars by a breach of the warranty, to have given the Circuit Court jurisdiction.—Const., Art. 5, § 10 ; Code, § 711 ; Crabtree *et al.* v. Cliat, 22 Ala. 181 ; Crosby *et al.* v. Clark, 1 M. & W. 286, and cases cited.

On a motion to discharge bail, the court will look to the complaint, to determine whether the case is bailable at all, or whether the affidavit is sufficient for the form of action selected by plaintiff.—Hazard v. Jordan, 12 Ala. 180 ; Beckwith v. Baldwin, *ib.* 720.

D. G. Clopton and Seaborn Williams, *contra :*

A *mandamus* ought not to be granted for the following reasons :

The motion to discharge the bail was addressed to the dis-

cretion of the court, for it would be to render inoperative the bail process. A motion to quash or set aside proceedings in the nature of a process, is always addressed to the discretion of the court, and may be acted on or declined at pleasure. Reynolds v. Bell, 3 Ala. 58.

If the motion was addressed to the legal discretion of the Circuit Court, it is clear that a *mandamus* will not lie to control that discretion.—*Ex parte* Putnam, 20 Ala. 593; Lamar v. Com. Ct. of Marshall, 21 Ala. 778.

If the affidavit is insufficient, or the clerk had no authority to issue the bail process, the sureties can plead that matter when proceedings are instituted upon the bond.—Toulmin v. Bennett, 3 S. & P. 221; Kennedy v. Rice, 1 Ala. 12.

The writ of *mandamus* will be granted only where there is a specific legal right, and no other legal remedy to enforce that right.—Jones *Ex parte*, 1 Ala. 15.

In entertaining a motion to discharge the bail on the ground of the insufficiency of the affidavit, the court will not look beyond the affidavit; and the affidavit in this case is in compliance with the statute.—Code, § 2176. It is not necessary that the affidavit should state the amount of damage.—1 Brown 206.

The statute regulating bail in civil cases restricts it as to residents of this State. As to non-residents, the same right to hold to bail exists in this State as at common law.—18 Wend. 644. The constitution guaranties to the citizens of other States the same privileges as the citizens of this State, but no higher privileges. Will it be said, then, that a resident citizen may be held to bail upon the happening of certain contingencies, but that a non-resident cannot, even upon the happening of the same contingencies, whilst he is within this State? The greater includes the less.

A non-resident may be sued in this State, and the right to sue includes all the accessorials to a suit, among others, the right to require bail under proper circumstances.

The objection to the insufficiency of the affidavit should have been taken before putting in bail.—1 East 80, 330; 7 T. R. 355; 1 B. & P. 132.

PER CURIAM.—Petitioner avers, that John McLane, in February, 1854, caused a suit to be instituted against him, returnable to the Spring term, 1854, of Macon Circuit Court, for a breach of warranty in the sale of a slave, and caused the petitioner, who then was, and now is, a resident citizen of the State of South Carolina, to be arrested by his body; in consequence of which arrest, he was compelled to enter into a bail bond to keep out of the common jail.

At the return term of said writ, petitioner moved to discharge the bail, on these several grounds: 1st, because the affidavit was insufficient, in failing to show the extent of damage sustained by the alleged breach of warranty; 2d, because the defendant is a non-resident of this State, and not liable to be held to bail in this State for unliquidated damages; and, 3d, because, in such case, the clerk had no authority to make an order requiring bail.

The petitioner proved to the court that he was a non-resident; and his motion, having been considered, was by the court overruled.

The settled rule seems to be, that the writ of *mandamus* will be granted only where there is a specific legal right and no other legal remedy adequate to enforce that right.—*Ex parte* Jones, 1 Ala. 15. In this case, the petitioner has been held to bail, and has given a bail bond in order to obtain his discharge. If, as he contends, the case is one in which bail cannot by law be required, he cannot be held liable upon his bond; and if a liability is fixed upon him by the judgment of the court, such judgment, in the event supposed, would be erroneous, and could be reversed on appeal. If, on the other hand, the bail was properly required, he has no cause of complaint. That the court has refused to quash the bond, on motion, is no ground for resorting to this writ. It is a matter of discretion with the court, to grant the motion or put the party on his plea when proceedings shall have been instituted on the bail bond (Reynolds v. Bell, 3 Ala. 57-8); and this writ does not lie to control an inferior court in the exercise of its discretionary powers.—*Ex parte* Putnam, 20 Ala. 592. So, also, in Lamar v. The Commissioners' Court of Marshall County, we said: "*Mandamus*, when directed to inferior tribunals, is a writ which seeks to compel action;

but it does not point out, in a matter over which that court has a discretionary power, how that court shall act." See, also, *Ex parte* Edward Henry, at the present term.

This case is unlike that of Barnett *et al.* v. The Warren Circuit Court, Hardin's Rep. 172, where the Circuit Court refused to quash a bond for security for cost and to dismiss a suit for want of a good bond. Here there is a legal remedy, or will be one in due time. In that, there was none; for, if the defendants gained the suit, in which event they would recover their cost, they had no security for it, and, having recovered, they could not reverse their own judgment. As we have already seen, whenever the defendant is held liable on this bond, he has his appeal, which clearly distinguishes it from that case.

Motion denied, with costs.

SHERROD *vs.* THE STATE.

1. A physician's office is not a public place within the statute against gaming, when the playing is at night, with closed doors and curtained windows; although it is also shown that the room adjoined a merchant's counting room, with a door communicating between them, and that the person who occupied it as a sleeping room was in the habit of inviting his friends to come to his room for the purpose of playing.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. ALEX. B. CLITHERALL.

THE form of the indictment in this case was identical with that of Burdine v. The State, *ante*, p. 60. The evidence was, "that the playing took place in a room adjoining the counting room of Noland & Walker, merchants in the town of Carrolton; that there was a door which opened from said counting room into the room in which the playing was; that the key of said door was sometimes on one side, and sometimes on the other; that said room was occupied by witness as his bed room, he being an unmarried man, and living in said town;

that Dr. Williams, a practicing physician residing in said town, kept his medicines, &c., in said room, and kept his office there: that said Williams was a married man, and slept at his own residence, and rarely visited said room at night; that witness had rented said room from Noland & Walker, and that Williams was in, with his consent, under some contract with Noland & Walker; that frequently, before the night on which defendant played, witness had been in the habit of inviting his friends to come to said room to play cards; that sometimes, when they were assembled in said room, without being invited there to play cards, others than witness would propose to play, and did play; that sometimes others, who were not invited, would come to the door during the playing, and knock, and that some of them would be invited in, and others refused admittance; that the windows of said room were curtained, and the doors closed, during the playing, and that the parties playing could not be seen from the street." The court charged, that this was a public place within the purview of the statute; to which charge the defendant excepted, and which he now assigns for error.

S. F. Hale and A. A. Coleman, for the appellant.

P. T. Sayre, for the Attorney General, *contra.*

GOLDTHWAITE, J.—The indictment was good, and the charge erroneous.—Burdine v. The State, at the present term. Let the judgment be reversed, and the cause remanded.

Ex Parte PERRYMAN and WIFE.

1. When an administrator refuses to plead the statute of limitations, the distributees of the estate cannot, on motion, be made parties to the cause for the purpose of putting in that plea.

Motion for a *mandamus* to the Circuit Court of Wilcox.

J. H. Campbell, for the motion.

CHILTON, C. J.—It appears that an action is pending in the Circuit Court of Wilcox county, at the suit of John P. Marsh, against William D. and Stephen Marsh, as administrators of one ——— Marsh, deceased, to recover upon an account for work and labor done and performed by the plaintiff, for and at the request of the intestate in his life-time. The administrators refuse to plead the statute of limitations of three years to the account, and the petitioners (the wife of Perryman being the daughter of the intestate) moved the court by their counsel, at the last term thereof, to be allowed to defend the action upon that plea. The court refused to allow them to appear and make the defence, and they now seek this remedy to compel the court to admit them.

We think the circuit judge did right in refusing the petitioners' application. We know of no rule of law, which would authorize the distributees, in a suit against the administrator, to come into a court of law, thrust the real parties aside, and take the management of the cause.

The law commits the administration of the estate to the defendants, who act, as well for the benefit of creditors, as for the distributees. They are required to enter into bond for the faithful performance of the duties of their office; and if they collude with pretended creditors, and pay simulated debts which constitute no charge upon the estate which they are appointed to administer, they can be held liable to the parties injured thereby; but they cannot be anticipated and superseded in this way. They are, for the purposes of this suit, in the law court, the proper judges of what defence they will rely on, being amenable for a legal and proper discharge of their duty.

Let the motion be denied, with costs.

Ex Parte WALKER.

1. On an application to the Supreme Court for a prohibition, or other remedial writ, to vacate certain orders of the Chancery Court, in the appointment of a receiver and the imprisonment of the petitioner for contempt of court, in refusing to pay over to the receiver certain moneys in his hands, the bill will not be examined and construed with the same degree of strictness as to technical accuracy as on demurrer: if it shows that the court had jurisdiction of the parties and the subject-matter, although defective in some matter which might be supplied by amendment, it will be held sufficient, and a prohibition will not be awarded.
2. Therefore, in this case, a prohibition was refused, because, it was held, the bill was sufficient to give the court jurisdiction, being filed against a trustee, by persons who showed an interest in the trust fund, to prevent its waste and misapplication.
3. The appointment of a receiver is a matter of discretion with the chancellor; and where a bill is filed by the creditors of an estate, against a person who has obtained possession of funds belonging to it by representing himself to be the executor, and who is alleged to be insolvent, a receiver is properly appointed.
4. A chancellor has power under the Code (§§ 561, 3008, 3009, 3010, 3011) to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders.
5. Where the refractory party is in court, and has personal notice of the order with which he refuses to comply, it is not necessary that he should be served with a writ of execution of the decretal order, nor with notice that a motion will be made for an attachment against him.
6. It is not a valid objection to the order for the issue of an attachment, that it directs the imprisonment of the refractory party until he complies with the violated decree, directing him to pay over certain moneys in his hands to a receiver, and also gives bond to appear at the next term of the court and answer for his contempt.
7. Nor can the defendant claim, as a matter of right, that he should be allowed to give bond for the forthcoming of the money in his hands before the order for an attachment is made: that is a matter to be addressed to the sound discretion of the chancellor, who may order the attachment without it.

Application by Benj. W. Walker for the writ of prohibition, *mandamus*, or other remedial process, to vacate certain orders of the Chancery Court of Macon, the Hon. James B. Clark presiding, made in a certain cause therein pending, wherein William Dougherty and others are complainants, and said Walker and others are defendants; one of said orders appointing a receiver in said cause, and directing the

petitioner to pay over to him certain moneys in his hands; and the other directing the issue of an attachment against the petitioner for contempt of court, in refusing obedience to the previous order. A transcript of the proceedings in said cause is filed with the petition, as a part thereof, and from it the following facts appear:

The complainants allege, that they are resident citizens of Georgia, and are creditors by judgment or specialty of the estate of James C. Watson, late of Muscogee county, Georgia, deceased; that letters testamentary on the estate of said Watson were granted in 1843, by the Court of Ordinary of said county of Muscogee, which county was the domicil of said Watson at the time of his death, to said Ben. W. Walker and John H. Watson, who gave no bond, or other security, for the faithful execution of their said trust, as none was required by the laws of Georgia; that said executors returned to said court no inventory of their testator's estate, nor did any other act towards its legal administration, but, colluding and confederating with the other distributees of the estate, entered into an arrangement with them for the distribution of said estate, by which its creditors were entirely defeated in the collection of their debts; that afterwards, to-wit, in 1847, the letters testamentary previously granted to said executors were revoked by said Court of Ordinary of Muscogee county, and one Mansfield Torrance was appointed administrator *de bonis non* of said Watson's estate; that said Torrance was afterwards removed from said administration by said court, and said William Dougherty, one of the complainants, was afterwards appointed administrator *pendente lite* of said estate; that said Walker afterwards applied to said Court of Ordinary to vacate the said order revoking his letters testamentary, being induced to make the application by the expectation that the Congress of the United States would soon make an appropriation of a large amount to the estate of said Watson, which sum the said Walker wished to get into his possession; that said application was refused by said Court of Ordinary, and said Walker appealed from its decision to the Superior Court; "that said appeal is yet pending, undecided and undetermined, leaving the said judgment of the Court of Ordinary unreversed and in full force.

The bill further alleges, that Walker, notwithstanding the said revocation of his letters testamentary, still claimed to be the executor of said Watson in Georgia, and to have the right to collect all moneys due to his estate; that complainants, said Walker being wholly insolvent, applied to said Court of Ordinary, as by the laws of Georgia they had a right to do, for an order requiring him to give bond, with security, for the faithful administration of all moneys belonging to said Watson's estate which might come to his hands; but the court refused the application, on the ground that it had no jurisdiction to make such an order after the revocation of his letters testamentary; that said Walker, in the meantime, filed a copy of said Watson's will in the Probate Court of Macon county, in Alabama, and thereupon letters testamentary in this State were granted to him by said Court; that an act of Congress was passed in 1852, "for the relief of the legal representatives" of said Watson, making an appropriation of a large sum of money, to-wit, about $25,000, in payment of a claim which said Watson held against the United States; "that Walker threatened to apply for said money in both characters or capacities, asserting his right to it to be unquestionable in either one or the other, and, as complainants are informed and believe, did so apply to Mr. Corwin, then secretary of the treasury, who refused the application, on the ground that Walker, after said revocation of his letters testamentary, was not the executor or legal representative of said Watson in Georgia.

It further alleges, that soon afterwards, a change having taken place in the office of secretary of the treasury, Walker threatened to renew his application for said money, and thereupon complainants filed their bill against him in the Superior Court of Muscogee county, and enjoined him from further proceedings to collect said money; that nevertheless said Walker again made application to the treasury department, then filled by James Guthrie, the successor of said Corwin, "and demanded that said money should be paid to him as executor of said Watson either in Georgia or Alabama"; that complainants again resisted his application, and the said secretary of the treasury thereupon decided that the said money could only be paid, under said act of Congress, to the

legal representatives of said Watson in Georgia, and that said Walker, his said letters testamentary having been revoked by a court of competent jurisdiction in Georgia, was not entitled to receive it: that Walker again renewed his application to said Guthrie, for said money, in April, 1854, "as the legal representative of said Watson in Georgia, falsely representing himself to be such executor and representative"; that of this application complainants had no notice or intimation whatever, until after said Walker had obtained from said Guthrie an order for the immediate payment of said money to him "as the executor and representative of said Watson in Georgia," and the money had been paid to him accordingly; that of the money so received by Walker, a portion was retained by James Abercrombie, of Macon county in this State, in payment of a claim held by him against the estate of said Watson, and other portions were deposited by said Walker with divers other persons, all of whom are made defendants to the bill, for specified purposes.

The prayer of the bill is, that a receiver may be appointed to take charge of the fund; that the several defendants may be required to pay over to him the money in their hands, and he restrained and enjoined from making any other application of it; that the money, when collected, may be paid over to the said William Dougherty, or to such other person as shall then be the legal representative of said Watson in Georgia, to be duly administered according to the laws of that State; and also for general relief.

An injunction was granted according to the prayer of the bill, on complainants' entering into bond. The defendant Walker afterwards filed his answer; but it is unnecessary to notice its allegations, as this motion is predicated on the statements of the bill only. Appended to his answer is a copy of the written opinion of Mr. Guthrie, directing the payment to Walker of the money appropriated by Congress, on the ground that the decision of the Court of Ordinary in Georgia, revoking Walker's letters testamentary, had been reversed on appeal by the Supreme Court of that State. At the May term, 1854, of the Chancery Court of Macon, a receiver was appointed in the cause, and the defendants were ordered to pay over to him the money in their hands received

from said appropriation. On the same day another order was made, reciting that Walker was in court when the previous order was made, and had personal knowledge of it, and that satisfactory evidence was produced to the court that he had afterwards left the town where the court was sitting, without complying with said order, and with a view of evading it; and ordering that said Walker therefore stand committed for a contempt of court, and that the register issue an attachment against him, directing the sheriff to arrest him, and to keep him in close custody "until he pay over the said sum of money in his hands, and enter into bond, payable to the register, in the sum of one thousand dollars, with good security, conditioned to appear at the next term of said court and answer said contempt."

Saml. F. Rice and Thos. H. Watts, for the motion, argued the case orally and in writing; contending that, as the bill showed on its face a want of equity, the chancellor had no jurisdiction of the case made by it, and therefore all his orders were void, and prohibition ought to be awarded to arrest proceedings under them. After the delivery of the first opinion, they made application for a re-hearing, in response to which the opinion pronounced by the Chief Justice was delivered. No brief of their main argument (on the equity of the bill) has come to the Reporter's hands, but the substance of it is incorporated in the argument on the petition for re-hearing, which is subjoined:

If the court had jurisdiction of the case made by the bill, still it exceeded its jurisdiction, and departed from the law and practice in each order made by it. There is no affidavit sustaining the main allegations of the bill, except that of William Dougherty, one of the complainants. Walker's answer is responsive, and denies the principal allegations of the bill; it is not outweighed by any evidence or affidavit, and it is clear that, in such case, the chancellor violated the law and practice in appointing a receiver.—Thompson v. Diffenderfer, 1 Maryland Ch. R. 489, and cases there cited.

The order of commitment is void, not being authorized by any law or rule of practice. "If the court has jurisdiction regularly, and in the commitment exceeds the power of the

law (as if a man should be committed for life for disobedience of a lawful order), the proceeding would be *coram non judice*, and the order merely void."—*Ex parte* Alexander, decided in Kentucky, in July, 1853, and reported in the November number (1853) of the American Law Register, p. 44; also, Bickley v. Commonwealth, 2 J. J. Marsh. 572. In *Ex parte* Alexander, it is also said: "The power to imprison for contempt is derived merely and absolutely from the necessity of the case; no further punishment, therefore, can be inflicted lawfully, than is necessary in the strictest sense. So, when there is a commitment for the purpose of coercing the payment of money, or the delivery of property, the court should provide in the order that the party be discharged on giving security for the money in some form, when he has not got it, and on paying the price of the property, if it shall turn out that the party cannot deliver it; and so of other cases, in order that nothing shall be inflicted but of necessity. No absolute power exists in this country; it cannot exist in a republic." It is doubtful whether *habeas corpus* could issue in this case from a circuit judge, a chancellor, or primary court; but prohibition certainly lies from this court on any such void order.

The court is also requested to notice the fact, that the order was made on the 6th of May, and was executed on Walker on the 12th. There is no evidence that he had the money on the 12th, and in fact he did not. The order should, at all events, have allowed him to give security for it, in the event he did not have it when arrested; for, although he had it on the 6th of May, he might have lost it, or been deprived of it, by some accident or misfortune, before the arrest, and the order should have provided for such contingency. The order goes beyond what was necessary in this respect, and is void. It also goes beyond what was necessary, in requiring not only payment of the entire sum, but also a bond for $1000 to appear at the next term to answer for a contempt, of which the chancellor had already convicted him, and ordered him to stand committed.

The fact that Walker was in court when the order was passed appointing a receiver, and ordering him (the receiver) to enter into bond to be approved by the register, and that

he (Walker) had notice of such order, and that he "left the town of Tuskegee a short time after the passage of said order, without complying with the terms thereof, and with a view of evading the same," do not constitute one of the "cases" "to which the power of the several courts of this State" is confined, in the issue of attachments and infliction of summary punishment for contempt, by the 561st section of the Code.—The Commonwealth v. Deskins, 4 Leigh 685.

Nor do the aforesaid facts bring the case within the influence of sections 3008, 3009, 3010, or any other section of the Code.—1 Smith's Chancery Practice, 428, 429 to 432. Sections 3008, 3009 and 3010, apply only to final orders, rules and decrees.—Buffum's case, 13 New Hamp. 14. It is certain that the Code of Alabama did not intend to enlarge the power of the courts to punish for contempts, and did not design to make the power of the courts of this State greater than the power of the British courts in matters of contempt. But the intention was to diminish the power of the courts here, and to restrict the power to the cases enumerated expressly in the Code. This is the fair and reasonable construction.—Code, § 561; *Ex parte* Thatcher, 2 Gilman 167. No English court possesses the power which was exercised by the chancellor in this case. The receiver had no authority to receive the money until he executed the required bond, nor until it was approved by the register: Walker could not be in default or contempt in leaving Tuskegee before that bond was executed or approved. Was Walker to remain there until it was executed?

But suppose the execution and approval of the bond was not essential to the authority of the receiver to receive the money; then there was not even "the service of a copy of the order or decree" on him, nor was there the issue or service of "a writ of execution of the order," which is essential to ground process of contempt.—1 Smith's Ch. Pr. 429; 3 Chitty's Eq. Dig., 1858, § 8; Buffum's case, 13 New Hamp. 15. The English practice governs this case, unless repealed by statute.—Gates v. McDaniel, 3 Port. 356.

An order of court, adjudging a party guilty of contempt, must always show, on its face, the facts upon which the exercise of the power is based. If it fails to show this, it cannot

stand.—The People v. Turner, 1 California 152; *Ex parte* Field, 1 *ib.* 187; *Ex parte* Thatcher, 2 Gilman 170. "The appellate court may revise and reverse" (or prohibit) the judgment of any other court in Alabama, adjudging a party guilty of contempt, "when it exceeds its jurisdiction, by treating that as a contempt which, in law, is no contempt, and cannot be."—*Ex parte* Thatcher, 2 Gilman 170. No other court in this State than the Supreme Court, can revise the action of the Chancery Court in a matter of contempt, and the writ of prohibition is the appropriate writ for controlling the Chancery Court in this respect.

Walker has been deprived of his liberty, "without due process of law," contrary to our supreme law. He has been convicted of a contempt, without any service of the order which he is charged with disobeying, or any issue or service of a writ of execution of the order. Courts of justice have never yet adopted as a basis of action in matters of contempt, the mere fact that a party had heard of, or had verbal notice of, an order. The basis of action must be in writing, and appear of record. There must be service evidenced on the record in some legal manner. The mere evasion of service of an order is not a contempt.—4 Leigh 685. The conviction by the chancellor does not pretend that Walker evaded the service of a writ of execution of the order, or that such writ of execution ever issued, but only that he left Tuskegee after notice (not service) of the order appointing the receiver, &c., "with a view of evading the same" (that is, said orders).

The court is also requested to examine the bill again, and the question of jurisdiction therein stated. It is not denied that the court had jurisdiction of the case stated in the opinion; but it is insisted, that the case stated in the opinion is totally and radically different from that stated in the bill. The bill may contain the allegations which the bill imputes to it; but it certainly contains other allegations in connection therewith, which make the case totally different from that stated in the opinion. The bill shows that the fund in question was a debt due by the United States (ubiquitous in its nature), and was collected by (Walker) an executor duly appointed in Alabama, and that this Alabama executor had the fund in Alabama, and that he had given bond and secu-

rity here, which is not pretended to be insufficient. These facts, which give a fixed character to the case, are nothinted at in the opinion. The bill shows that the complainants do not claim under or through our laws which govern administrations and the distribution of assets amongst creditors, but in defiance and contempt of our own laws. The opinion gives no such idea of the bill. If the complainants (creditors living in Georgia) showed by their bill that they claimed under our laws (and not in opposition to our laws) regulating administrations, the opinion might be correct. But the principal thing in the bill is, that the Georgia law must govern the administration of the fund, as amongst all the creditors of the estate (some of whom the bill shows reside in Alabama); and if the Supreme Court cannot decide that the Georgia laws must govern the administration of the funds as between all the creditors (including Alabama creditors), there is no jurisdiction of the case made by the bill; for all else in the bill is merely incidental or accessorial to this position. Where the principal falls, the incident or accessorial falls with it.—Pond v. Lockwood, 8 Ala. 669 (5th headnote).

The complainants must be held to the case they have made. They cannot make a new case. They do not aver or show any right, as creditors, under any Alabama law. They do not pretend they ever filed their claims or presented them in Alabama, although more than eighteen months elapsed before the bill was filed, which is a bar under our law. The law is clear, that the fund must be administered in Alabama, and according to Alabama law, amongst all creditors not barred; and that until the administration here is completed, no part of the fund can be transmitted to Georgia.—Dent's Appeal, decided by Supreme Court of Pennsylvania in 1854, and reported in the May No., 1854, of the American Law Register, p. 446; Smith v. Union Bank, 5 Peters 518; Preston v. Melville, 8 Clarke & Finnelly 1; Childress v. Bennett, 10 Ala. 751; Haydock's Appeal, 7 New Hamp. 503; Churchill v. Boyden, 17 Vermont 319; Stacy v. Thrasher, 6 How. 44.

Kane v. Paul, 14 Peters 33, has no bearing on the case; for that case proceeds upon the ground that the effect of the act of Congress of 24th June, 1812, is, to render null

and void any administration granted in the District of Columbia upon the estate of any citizen of any State in the Union, after letters testamentary or of administration have been granted thereon "in any of the United States or the territories thereof." The administration granted in the District of Columbia to Kane, was held wholly void, and therefore the executor appointed in Maryland recovered. But the Supreme Court of the United States has never decided, that where an executor has been duly appointed in one State, there could not be a valid grant of administration in any other State; on the contrary, the validity of appointments in different States has always been admitted.—Stacy v. Thrasher, 6 How. 44.

The debt due by the United States, until collected, was ubiquitous—was as much in Alabama as in Georgia (15 Peters 1); and from this very nature of such debt, as well as from the terms of the act making the appropriation to pay this debt, any representative of Watson's estate, appointed lawfully in any State, had authority to receive it and administer it. Walker received it—never had it in Georgia, but has it in Alabama—and our creditors must be paid out of it, and may enjoin others from reducing or wasting it in any manner whatever.—Harvey v. Richards, 1 Mason 381.

It is clear that Walker had been appointed executor of Watson both in Georgia and Alabama, and that in his application for the money to the secretary of the treasury, he made known both his appointments, and claimed that he was entitled to it under both, and that he was certainly entitled to it under his appointment in Alabama, even if his Georgia appointment was revoked. In other words, he contended that his appointment as executor in Alabama gave him at least equal authority with any Georgia administrator *de bonis non*, if not paramount authority, to receive the money. The secretary did not decide or order it to be paid to him as Georgia executor, but to "Benjamin W. Walker as executor &c., of James C. Watson." This decision is not affected by the reasons assigned for it by the secretary, and his decision does not convert the fund into a Georgia fund, or exempt it from the operation of the laws of Alabama governing administrations.

JOHN A. ELMORE and WILLIAM DOUGHERTY, *contra :*

On this motion, the only inquiry is, whether the chancellor had jurisdiction of the question presented to him, and which he decided; for, before the interference of this court can be invoked, he must have transgressed his authority. The rule is settled in Morgan Smith's case (23 Ala. 94), as well as in other American and English cases, that where the matter is within the cognizance of the court, a prohibition will not be granted; and on this point all the judges are agreed, only differing in the application of the rule to the facts of that case.

There is some difficulty, perhaps, in finding a satisfactory definition of jurisdiction in the books, as applied to the powers of a court. Bouvier defines it to be "a power, constitutionally conferred upon a judge or magistrate, to take cognizance of and decide causes according to law, and to carry his sentence into effect." See, also, 1 Story's Equity, §§ 57, 58. We define it to be, the power or authority to pronounce the law on the case presented, and to pass upon and settle by its judgment the rights of the parties touching the subject-matter in controversy, and to enforce such sentence. The derivation of the word—*jus dicere*—and the practice of the courts, prove this to be substantially correct. When it is said that a court has no jurisdiction of a matter, we mean that it can pronounce no judgment in the case on the rights of the parties—that it cannot even render a judgment in favor of the defendant, establishing his right to the subject-matter in dispute, which will bind the plaintiff. This is the test of the jurisdiction. The opinion that there is no jurisdiction in cases where a demurrer to the bill would be sustained, is erroneous; if the demurrer was allowed because of the want of jurisdiction, the proposition is true; but if a decree could be rendered for the complainant, in relation to the subject-matter, in any aspect in which the bill could be filed, the court would have jurisdiction. If it be determined that there is a want of jurisdiction in every case where the allegations of the bill are defective, because there is a want of equity, writs of prohibition will become numerous, unless the Legislature interferes, or this court retraces its steps.—In this case, the chancellor had the power to consider the

questions submitted, and to render a decree thereon binding on both parties as to their right to this fund. If the prohibition is granted by this court, will it not be on the ground that Walker, as against these complainants, is entitled to the fund? and will not this be a judgment on the rights of the parties to the fund, a judgment on the subject-matter in dispute, and not on the jurisdiction of the court? We admit, that loose *dicta* are to be found that courts cannot, in certain cases, give relief; but this means only that, under the rules of the court, the party has not presented a case entitling him to relief, and not that the court had no jurisdiction. In 7 Gill & John. 210, it is said, that "chancery can have no jurisdiction, where it can give no relief"; and this is true in a qualified sense, and was true as applied to the facts of that case, the lands in controversy being beyond the jurisdiction of the court.

On the issue presented by the counsel for the motion, as to the equity of the bill, every allegation of the bill is to be taken as true. The main argument here rests on the statement, that Walker had been removed from his office of executor, by the Court of Ordinary in Georgia, before he received the money; and this admits, that, if he had then been executor in Georgia, the relief asked would have been given under the facts of the bill: it claims for Walker an exemption from liability on the ground of his fraud. The argument is, that Walker was not executor in Georgia, and although he fraudulently represented himself to be so, and thereby and in that character obtained the fund, yet, because of the fraud, he received it wrongfully; and the money is no part of the estate of Watson, but is still the money of the Government, for which Walker is liable to a suit by the Government only; and that the debt is still due to the estate of Watson by the Government, and to that source the representative in Georgia must look, and not to Walker. Another aspect of it is, that Walker, being the representative in Alabama, had the right to reduce this fund to possession, although an ancillary representative only; and if he first collected it, no matter by what means, he has the right to retain it, as a fund belonging to the local administration, and that as such local administrator he had the right to collect it under the act of Congress of 1812, and to retain it as assets of his local administration.

The administrator of the domicil is the original or principal representative; all others are local and ancillary, or subordinate to it.—Story's Conflict of Laws, §§ 514, 518. It is true that, within the respective limits of the States conferring their authority, and as to the assets belonging to their respective jurisdictions, each is independent of the other, at least as to their powers over their respective assets, and the payment of the debts of the deceased; but, although each is independent of the other in some respects, the powers of each beyond their respective States are very different. The bill charges Walker with having received the money appropriated by Congress to the legal representatives of Watson, and that this money belonged to the assets of Watson's estate in Georgia, and was subject to administration in that State; that it was a trust fund for the payment of Watson's debts there, according to the laws of that State, and that the complainants are, by the laws of that State, as judgment and specialty creditors, entitled to a preference in payment from this fund, over simple contract creditors.

In the case of Harrison v. Mahorner, 14 Ala. 829, the facts were: Hooe died domiciled in Virginia, leaving his will; two of the executors qualified in that State; Mahorner took out letters on this will in the State of Mississippi, and had them duly recorded in the County Court of Pickens county, Alabama, under the statute of this State (Clay's Digest, § 31, p. 227), and then brought an action of debt as such representative against Harrison, in this State. The representatives in Virginia never recorded their letters in this State. It was held, that the representative mentioned in the statute, was the original, and not the ancillary representative, who was entitled to sue in the courts of this State. The case of Kane v. Paul, 14 Peters 33, runs on all fours with that of our own court, and with the case under consideration. The act of Congress of 1812 authorizes executors and administrators in the States and Territories to sue for and recover debts due to the deceased in the District of Columbia without taking out letters within that District. This statute, in effect, confers on foreign representatives precisely the same powers as our statute, but imposes no conditions on them. Paul qualified in Maryland, the place of the domicil of the testator, as his exec-

utor; the testator had a claim against the Government; after his death, and while the claim was pending, letters of administration, with the will annexed, were granted to Kane by the Orphans' Court in the District of Columbia. The claim was allowed, and Kane received the money from the Government. Paul brought an action against Kane to recover the money: and it was held, that Paul was entitled to recover; that the letters granted to him entitled him to recover, without his having the letters of administration granted by the Orphans' Court of the District of Columbia repealed or revoked.—14 Peters 33. It makes no difference that Paul was the executor, and that Dougherty is an administrator *pendente lite*. His authority to collect the assets of the estate, by suit or otherwise, is as ample as if he was the executor, and he is the representative of the domicil.

Again; in reference to the act of Congress, in 15 Peters 6, the court say: "The United States, in their sovereign capacity, have no particular place of domicil, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets within his own domicil. On the contrary, the administrator of a creditor of the Government, duly appointed in the State where he was domiciled at his death, has full authority to receive payment, and give a full discharge, of the debt due to his intestate, in any place where the Government may choose to pay it, whether at the seat of government, or at any other place where the public funds are deposited." And again, on pages 7 and 8, it is said: "In effect, it made all debts due from persons within the District, not local assets, for which a personal representative would be liable to account in the courts of the District, but general assets, which he had full authority to receive, and for which he was bound to account in the courts of the State from which he received his original letters of administration."

The terms of the act of Congress, although embracing an ancillary representative, are controlled by the general principles of law; and under these decisions of the United States courts, are held to mean those persons only who fill the measure of the description. No one is a full representative of a

deceased person, but the representative of the domicil; all others are but partial, local representatives. This is the doctrine also asserted in Harrison v. Mahorner, and no other can be maintained on principle. In such cases, the rule of construction is, "*Quod verba equivoca, et in dubio posita, intelliguntur in digniori et potentiore sensu.*" This is fully illustrated by the examples given in Gregory's case, and by the case itself; as where there are two classes of things or persons and the term includes both, none but the worthier and higher class (*propter excellentiam*) shall be intended.—Gregory's Case, 3 Coke (6 Part) 19. Under the authority of the above cases, Walker had no authority, as executor in Alabama, to collect this fund. If he had taken out letters of administration in the District of Columbia, Dougherty, as the original representative, could have recovered it in an action at law. Can Walker's letters in Alabama give him greater rights than letters in the District of Columbia?

But this case is stronger than the one in Harrison v. Mahorner, in this respect. In the latter, the representative in Virginia had not filed in the proper courts of this State his letters, or shown any intention to avail himself of the benefits of the act of this State. Under the act of Congress it is as if Dougherty and Walker had both, under a law of the United States like that of Alabama, filed their letters; and, in effect, the controversy is between them. Dougherty has been earnest in pressing his claims to this fund; both in fact were claiming it, but the secretary of the treasury refused to pay the fund to either, until the controversy as to the revocation of the letters of Walker in Georgia was settled by the courts in that State; and in this decision, he distinctly said, that the representative in Georgia was entitled to the fund, and he should pay it to no other person. Dougherty, satisfied with this decision of Mr. Guthrie, returns home, to await the decision of this question about the letters of Walker in the Georgia courts. Some time after Walker secretly, as far as Dougherty was concerned, renews his application, and by false representations obtains the money.

If Walker, when he received the fund, had been in fact the executor in Georgia as well as in Alabama, he would have to account for it in the courts of Georgia, as being the place of

the general, principal administration, and not in Alabama, the place of the local, partial administration.

Dougherty's right to this fund as the representative of the domicil is unquestionable. That right is as trustee, first, for creditors, second, for the legatees or distributees. If Dougherty could litigate this question with Walker, there would be no difficulty; but he, as the foreign representative, cannot bring any suit in this State, as there is a representative here. Code, § 1934.

Under these circumstances, what is to be done? Walker has no right to the money; it belongs to Dougherty, as part of the estate of Watson in Georgia. Dougherty cannot sue Walker. There are in Georgia judgment and specialty creditors, who are preferred in the payment of debts by estates under the laws of Georgia. This fund is a trust fund to pay these debts. Walker has obtained it by falsehood and fraud, and has wasted the estate; and avowed that he intended to devote this money to the use of his family. We are told that a Court of Chancery can afford no relief, that there is a want of equity in the bill. Such a charge on our courts is a stigma on their character—that they cannot make Walker disgorge the fruits of his fraud. The complainants show all the elements of equity—fraud in the defendant in obtaining a fund, a want of right in him to it, a right in another as trustee, an inability in the trustee to sue, and their own rights as the parties in whose favor the trust exists, and danger of waste. It is no answer to this, to say that the Government paid, and Walker received, this money wrongfully. One of the first maxims of the law is, that no man shall take advantage of his own wrong or fraud. The whole argument on this point is answered by the case of Kane v. Paul.

When Walker received this fund, on the false and fraudulent representation that he was the executor in Georgia, and claimed it as such, and in that character received it, and when the fund in fact, as is charged in the bill, was assets belonging to the jurisdiction of Georgia, and as such assets he claimed and received it, will he be permitted now to deny that the fund was Georgia assets, and to claim it as Alabama assets? Story says, when a representative has gone out of the jurisdiction of his appointment, and collected assets of

his testator or intestate, he is liable to be sued by any creditor there, upon general principles, and upon the common law as executor *de son tort*. "For it would not lie in his mouth to deny that he had rightfully received such assets, and he could not rightfully receive them except as executor." Story on Con. Laws, § 514. p. 424-5; Campbell v. Tousey, 7 Cowen 64. In all such cases, by the collection of the assets, the person tacitly asserts that he is the executor, and thereby subjects himself to all the liabilities of one, although guilty of no fraud, and cannot deny the fact of that character, or that the assets were the assets of the estate. Yet it is contended, that Walker, by his fraud, stands in a better position than one innocent of this charge, and that he may deny this to be assets of the estate in Georgia.

The bill however, we insist, is filed in a double aspect: the one we have above been considering; and the other, that Walker is still the executor in Georgia, and in this aspect he stands before the court as the executor in Georgia, having returned this claim in his inventory there, with it collected by him as Georgia assets, insolvent, guilty of the grossest maladministration, without security for his acts, and creditors seeking to secure this fund from waste for their benefit. It is said there are other creditors in Georgia; this is but a want of parties, if true, and not a want of jurisdiction. It is an assumption only; the fact does not appear on the bill. But, if true, the bill asks that the fund be sent to Georgia, where they reside, and where they can place their claims before the proper tribunal.

It is not true, as urged in argument, that a decree of the court in this State would not protect Walker against the creditors in Georgia, if he should be sued there. This court has jurisdiction of the fund, and its decree is a judgment *in rem*, and binding on the world. When the local administrator has paid the debts of the estate, the assets remaining may be distributed in the place of his appointment among the legatees and distributees, or it may be sent by the order of a competent court to the principal representative for such distribution. In such case, what protects the local administrator from suit by legatees or distributees in another State, if they should find him there?—Code, §§ 1826, 1827. This ar-

gument is based on the fact, that Walker was the executor in Georgia, when he received the assets, when the bill charges he was not. or it is based on the principle that Walker could not deny the character in which he received the assets.

It is also said, there are creditors in Alabama. This is also an assumption: none are mentioned in the bill except Abercrombie, and he is a party and can litigate his rights.—That these creditors would not be bound by a decree against Walker, and could pursue him for these assets. Besides being a judgment *in rem*, Walker is the representative of the creditors here, and every judgment against him and concerning the estate which he represents, unless obtained by collusion, binds all who are interested in the fund. There is no view in which the rights of creditors in Alabama are involved, except the one in which we have been considering this case. If the fund is a Georgia fund, the Alabama creditors are not deprived of any rights by its being sent there: they can appear there in the proper forum, and litigate any matters they please with the Georgia creditors.

The argument derived from the character of the ubiquity of the United States is not entitled to serious consideration. The money was received out of the State of his appointment. If he had received it in Alabama, there might be plausibility in the idea; but the Supreme Court of the United States, in the cases referred to, has declared that this ubiquity exists or enures in favor of the representative of the domicil, and not of the local representative; that this ubiquity and the statute of 1812 makes the assets general and not local assets.—"Administration only extends to the assets of the intestate within the State where it was granted; if it was otherwise, the assets might be drawn out of the State to the great inconvenience of domestic creditors, and be distributed, perhaps on very different terms, according to the laws of another jurisdiction."—Doolittle v. Lewis, 7 Johns. Ch. 45, 47. This Walker is attempting to do by setting up a claim to the fund as local assets belonging to Alabama.

This question will come before this court hereafter in a very different aspect from the one now presented if the prohibition is allowed. When Walker is called upon by the creditors in Alabama to account for this fund, his answer is

ready—"I have no assets belonging to this jurisdiction."—When asked, "Where is the money you got from the Government," he says, "That don't belong to this jurisdiction. I returned it in my inventory in Georgia as belonging to that jurisdiction. I applied for it, and obtained it, as assets of that forum, and in the character of executor in Georgia;" and if he is required, he can prove all these facts to be true. The creditors say, "But you were not in fact the executor in Georgia at the time." Walker retorts, "What is that to you? the Supreme Court of Alabama have decided that I received the money wrongfully, by falsehood and fraud, and that the money I received was no part of the estate of Watson, but was money of the Government wrongfully paid to me, and I am liable to the Government for it—I hold it to pay the Government when I am sued." He laughs in their faces, and, we may add, in the faces of the creditors of Georgia, and in the faces of the courts of both States. He has already put at defiance the courts of Georgia, and has attempted to do the same thing with the Chancery Court of this State. Having failed, he asks the aid of the Supreme Court.

If Walker by any admissions he has made be held liable here for this fund as assets within this State, yet are his sureties bound by such admission? He is utterly insolvent, has wasted the assets of his trust, has avowed his purpose to appropriate this fund to his own use, and on his admission of the truth of the bill he will do so. It is a fact, then, that if the creditors in Alabama get this fund, it will be only through his sureties, who will resist a recovery, and, under the facts and the law, are not responsible for this fund; and what then becomes of the rights of the Alabama creditors as pressed into the argument? The sureties are not bound by any decision made in this cause, or by any unofficial admissions of Walker or any others.

These considerations all prove, that at least it is questionable if the bill ought not to be sustained; and in a case of doubt, the prohibition is not allowed. This writ stops all proceedings in the cause, and Walker is turned loose with seventeen thousand dollars in his pocket, belonging to the estate of Watson, either in Georgia or Alabama, utterly insolvent, utterly reckless and dishonest, having wasted the

estate already, and avowing that he intends to waste this fund. The court will surely pause before it permits such a result. How much greater the necessity for consideration, when its act indirectly produces this consummation.

LIGON, J.—The counsel for the relator insists, that the bill in this record does not make out a case of which the Chancery Court of Macon county can take jurisdiction; and thence concludes, that all orders made by the chancellor, in reference to it, are *coram non judice*, and void. If, on examination, such should be found to be the case, we should not hesitate to award the prohibition which is asked.

We have already held, that this court has the power, under the provisions of our State constitution, to prohibit the Chancery Court, where a proper case for the exercise of this power is presented.—*Ex parte* Morgan Smith, 23 Ala. 94. In that case it is held, that, where those courts act without jurisdiction, or where, having jurisdiction of the subject-matter and the parties, they exceed that jurisdiction, by making some order in the progress of the case which is directly and clearly repugnant to some law regulating the exercise of that jurisdiction, and the party injured can have no immediate redress by appeal, writ of error, or any of the ordinary modes pointed out by law, they should be compelled to desist from the execution of such order, or promptly to vacate it, and to this end a writ of prohibition should issue to them.

It is not pretended, in this case, that the order appointing a receiver is repugnant to any law regulating the exercise of the chancellor's jurisdiction over the appointment of such officers; on the contrary, it is admitted to be regular so far as mere practice is concerned. But it is contended, that the court making the order could not rightfully take jurisdiction between the parties on the case made by the bill, and is wholly incompetent to grant the relief sought; in other words, that the court has usurped jurisdiction which does not belong to it, and consequently is without authority to make any valid order in respect to the case.

To ascertain whether this is true, we must look to the case made by the bill, and to that alone, for its statements and allegations must be taken as true on all questions of jurisdic-

tion of the court in which it is filed. That a court of equity has a general jurisdiction over all matters of trust, and the power by way of preventive justice to stay any waste of the trust estate, are propositions of elementary law, which require no citations of authority to sustain them. It is equally clear, that it will exercise this jurisdiction, and exert these powers, on the proper application of any person or persons interested in the trust estate, when their interest is made to appear by the bill, and the existence of the trust and danger of the fund to which it attaches are sufficiently averred. Nor do we esteem it necessary to the exercise of these powers in the first instance, that the bill, which invokes the aid of a court of chancery, should be drawn with such technical accuracy as to defy a demurrer for every special cause relating to parties or form, in respect to which, if it were defective, the defect might be readily supplied by an amendment, which would be allowed as a matter of course. It is enough, if it be shown, by some persons having an interest that the subject-matter is within the jurisdiction of the court, and that the danger and injury sought to be averted are real and pressing. So that, in passing on the question arising on this motion, it is not necessary for the court to decide upon the technical accuracy of the bill in all its details, but simply to inquire, whether, conceding the truth of the substantial allegations of the bill, the court entertaining it had jurisdiction of the subject-matter and the parties.

These things premised, we proceed to a general examination of the bill under consideration. It is filed by persons who represent themselves to be creditors, by judgment or specialty, of the estate of J. C. Watson, deceased, in the State of Georgia, against a resident of the chancery district in this State in which it is exhibited, and other persons citizens of this State; it avers, that Walker, by false representation and fraud, has possessed himself of the funds of the estate to the amount of $25,000, and that he has already misapplied a portion of this sum, and has threatened to misapply and waste the remainder, by converting it to his own use, or that of his family; that the moneys belong to the estate of Watson in Georgia, where he was domiciled at the time of his death, and where administration was granted on his estate; that Walker is wholly irresponsible, and insolvent; and that, if

he is permitted to retain the money in his possession, he will misapply and waste the entire sum, and it will be wholly lost to those who are entitled to it by law. It further avers, that the complainants are preferred creditors of the estate, to an amount largely exceeding the sum in the hands of Walker.

These are the substantial allegations of the bill, and, in our opinion, make out a clear case for the interposition of a court of equity, under its general power over trustees and trust estates, and its ability to lay hold of a trust fund, when it is alleged to be in danger of waste, and to preserve and administer it according to the purposes of the trust.—2 Story's Eq. Jurisp. §§ 826–7–8. In doing this, a receiver is generally indespensable, and is always appointed when applied for.

The application for that officer was here made, and he was appointed by the chancellor. As the court had jurisdiction of the case made by the bill, both as it regards the subject-matter and the parties, we think the appointment of the receiver was clearly within the range of its legitimate powers; and as such appointment was made without violating any rule of law, it must be allowed to stand, and the application for a writ of prohibition must be denied.

Writ of prohibition refused.

CHILTON, C. J.—On a former day of this court, a motion was submitted, by the counsel for the petitioner, for the writ of prohibition, or other appropriate process, to be directed to the chancellor of the Middle Chancery Division, requiring him to vacate an order appointing a receiver in the cause of W. Dougherty *et al.* v. Walker, pending in the Chancery Court of Macon county: which order requires said Walker to pay over the money, admitted by his answer to be in his hands, and which he received from the United States, as the personal representative of the estate of Gen. Watson, deceased.

The ground relied upon by the counsel of Mr. Walker, in support of their motion, was, that upon the face of the bill, the Chancery Court of Macon was without jurisdiction, and consequently had no power to make the order complained of. This court, in response to that motion, without intending to pass definitively upon the merits of the controversy, but confining itself to the allegations contained in the bill, held, that

the court was not without jurisdiction to make the order, and that having jurisdiction, no prohibition could be granted.

An application is now made to re-hear the cause, and review the opinion then pronounced; and the court is asked, also, to consider as to the *regularity* of the order, as well as of the subsequent proceedings based upon it, by which the petitioner has been deprived of his liberty, and is now in prison for contempt, by reason of his failure to comply with the decree requiring him to pay the money to the receiver.

The counsel for the petitioner again presses upon our consideration the argument that the bill makes no case for relief,—that the former opinion was based upon a partial view of its allegations; and they insist, that, although they should be mistaken in this view, yet the chancellor has transcended his jurisdiction, in ordering an attachment against Walker for contempt, as shown by the record accompanying the proceedings.

Upon a careful review of the opinion, and re-examination of the allegations of the bill, we entertain no doubt of the correctness of our opinion denying the writ of prohibition; and without saying more upon that subject, we will at once proceed to examine the objections taken to the regularity of the proceedings for the contempt.

1. It is urged, that the order appointing a receiver is irregular, because the answer of Walker substantially denies the main allegations of the bill. We are of opinion, however, that there is a grave question of law to be settled in this case, which must materially affect the rights of the parties; that is, whether this fund is to be administered in Georgia, or in Alabama. The defendant insists, that he is the executor in both States, and has the right to administer the fund in either. It appears that the secretary of the treasury, in the opinion pronounced by him awarding the payment of the money to Walker, regarded him as the executor in Georgia, and the inventory attached to the bill of complaint, if it may be called such, shows that Walker has reported this demand against the Government to the Court of Ordinary in Georgia, as assets of his testator's estate, subject to administration there. Now it would be improper for us, perhaps, to anticipate this question by a decision of it upon the bill and answer

merely, as there may be facts which the pleadings do not specifically set forth, having a bearing upon it, and which may hereafter be developed. At all events, such a decision is not called for in response to the present motion. If it should turn out, upon a final hearing, that the fund in Walker's hands, received from the Government, is properly to be regarded as assets to be administered in the State of Georgia, then, as he is insolvent, the complainants have no security whatever for the administration of the fund in that State; as, in that event, it would be very clear the sureties which he he has given in this State would not be responsible for the fund, not being assets to be administered here. It is conceded by all, that the funds in his hands are assets of Gen. Watson's estate, charged with the payment of its debts; and placing them in the hands of a receiver is, in our opinion, a precautionary measure fully justified by the nature and circumstances of this litigation. The receiver is an indifferent person between the parties, appointed by the court to take charge of the fund pending the controversy. He is an officer of court, subject to its orders, and may be required to loan out the fund, so as to make it profitable, instead of suffering it to remain unproductive in the hands of one of the suitors. And it is well settled, that the appointment of a receiver is a matter resting in the discretion of the court.—3 Danl. Ch. Pr. 1949; Skip v. Harwood, 3 Atk. 564. "It is," says Lord Hardwicke, "a discretionary power, exercised by the court, with as great utility to the subject as any authority which belongs to it," &c. The appointment of a receiver involves the decision of no right, but is designed to secure and husband the fund, that it may be appropriated, without delay or inconvenience, as the court upon the final trial may adjudge. Nothing is more common in chancery practice, than the appointment of receivers, in suits against executors, where there is danger to the fund without such appointment; so, also, if he has wasted the effects, or in other respects has misconducted himself.—12 Vesey 5; 13 *ib.* 26; 3 Danl. Ch. Pr. 1956. Although mere poverty, of itself, may not furnish sufficient ground for the appointment of a receiver, as against an executor, yet, where it is coupled with other facts or circumstances, showing that he has proceeded not in accordance with law (as where

he has made private sales of the property of the estate, or is dealing with it on his private account), especially where it is doubtful whether he is, in fact, the legal representative, or is not shorn of his authority by removal, the court, in all such cases, should promptly secure the effects, by placing them in the hands of a receiver. If the executor be actually insolvent, in cases where he has given no security, it is held, generally, that a receiver should be appointed.—3 Danl. Ch. Pr. 1957; Scott v. Brecher, 4 Price's Exch. Rep. 346. Without stopping to point out the reasons which exist in this case more particularly, why a receiver should come, we should feel altogether unwarranted in holding, that the chancellor had exercised his discretion improperly. On the contrary, we entertain no doubt of the entire propriety of the order. If, on final hearing, it should turn out that the complainants have improperly invoked the action of the court, to the injury of the defendant, he has his remedy upon their bond for his indemnity.

2. But it is insisted, that the order committing Walker for contempt is void—1st, because it was an excess of jurisdiction, there being no law, or rule of practice, authorizing it; 2d, because it was not made upon notice to Walker; 3d, because it specifies or fixes no limit to the imprisonment; 4th, because, after paying the money, and thus complying with the order for disobedience to which he has been committed, he is required to enter into bond, with good security, to be approved by the register, &c., payable to said register, in the penal sum of one thousand dollars, conditioned to appear at the next term of the court and answer for the contempt; and, 5th, because Walker should have been allowed to give security that the funds should be forthcoming, and thus have been saved from the prison in the event he had disposed of the money. Let us briefly notice these objections in their order.

By the Code (§ 561), it is declared, that "the power of the several courts of this State to issue attachments, and inflict summary punishment for contempts, does not extend to any other causes than," &c. Here follow the causes, consecutively numbered, the third reading as follows: "The misbehaviour of any officer of the court, in their official transactions, or the disobedience or resistance of any officer of the

court, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree or command thereof." It is apparent, therefore, from this section, that the Chancery Court has the power to issue an "attachment for contempt" against any "party," for "disobedience to any order or decree" of the court.

Again; section 3008 declares, that "courts of chancery may also enforce their decrees, orders, and rules, by process of attachment against the party, or officer, in contempt, or by process of sequestration against his property." The next section (3009) provides, that when the chancellor decrees that an act shall be done, he shall prescribe the time within which it shall be done. Section 3010 provides for the issue of an attachment by the register, upon the affidavit of the party entitled to have the act done, stating that the decree of the court has not been performed, under which the defaulting party may be arrested, and committed to prison until he performs such act, or until he is discharged by a special order of the chancellor extending the time for the performance; and if, after such extended time elapse, the act is still unperformed, another attachment is to issue, upon affidavit. If the attachment cannot be executed, by reason of the officer not being able to find the delinquent, then section 3011 provides for the issue of a writ of sequestration.

These several sections of the Code give to the chancellor ample power to enforce his decrees by the process here resorted to, without which the Chancery Court would be impotent and powerless to afford relief as against a refractory suitor.

Nothing is said as to serving the party with a writ of execution of the decree before he can be put in contempt, nor of any notice to him that an attachment will be moved for. With respect to each, as applicable to the facts of this case, we do not hesitate to say, they were unnecessary. Walker was in court, and had personal notice of the order requiring him to pay the money in his hands to the receiver. He asked for no further time within which to pay the money, nor for leave to give security for its forthcoming at any future period. He submits to the order, and then, as the affidavits show, leaves the village with a view of evading it. Such being the

facts, the process of attachment may well issue without further notice. The most stringent English practice never required that a party should have *personal service* of the writ of execution of the decree, when he was personally present, and must have known of the order requiring him to act *instanter*.

In Rider v. Kidder, 12 Ves. jr. 202, Lord Chancellor Erskine said: "The reason of requiring personal service is, *non constat*, that there is a contempt; that the party knows he has neglected to do anything he was called upon to perform. But in this instance," he added, "a decree made when the defendant was present in court, she knows she has not done what she was directed to do, and must therefore be conscious that she is in contempt."

So, also, in De Manneville v. De Manneville, 12 Ves. jr. 203, personal service was dispensed with, it appearing plainly that the defendant had notice from his presence in court when the order was made. These were instances of *short orders*, as they were termed, fixing a period when the decree was to be enforced. The modern practice in England is, to dispense with short orders, and serve the defendant with a copy of the decree, which is required to fix the time of the performance; the party adding a memorandum, that on failure to comply, by the time limited, the defendant will be liable to be arrested, and have his estate sequestered. This, however, is by an order made in August, 1841.—2 Danl. Ch. Pr. 1250.

Without now deciding what would be the proper practice, as to notice of decrees made in defendant's absence, as a preliminary step to putting him in contempt, we feel no hesitation in saying, that no further notice in cases of the kind before us, under the provisions of our Code, is required. Where the party, being present in court, is ordered to pay over to an officer of the court, the receiver appointed under its order, a specified sum, admitted to be in his hands, he is in contempt when he attempts to depart the court for the purpose of evading the order. If further notice was required, in the language of Lord Chancellor Erskine, "the defendant might, when called upon to pay the money, keep out of the way, and so prevent the effect of a decree or order made when he was present in court."—12 Ves. jr. 202.

The counsel is mistaken in supposing that the order of

commitment in this case is for an unlimited time. The defendant is to be detained in custody, until he complies with the decree of the court, and finds surety for his appearance at the next term thereof, to answer for the contempt in departing the court for the purpose of evading its previous order. Its duration is dependent upon the defendant himself. He may make his confinement long or short, as he may readily comply with the requisitions of the writ, or obstinately refuse such compliance. We see nothing erroneous in this.

As to the requirement of a bond to appear and answer for a contempt, we think the chancellor did not exceed his jurisdiction, but exercised it regularly. If a party sets at defiance an order or decree of the court, in contempt of its authority, a just regard on the part of the judge for the majesty of the law, as well as for the dignity of his station as a minister of justice, requires that he should promptly vindicate its supremacy, by punishing the offender. The payment of the money merely, while it terminates the contempt arising out of its non-payment, does not efface the contempt of the previous refusal. For this, the chancellor has full power to punish. It is indispensable, in the administration of justice, that men should be made to respect the laws of the land and the judgments and decrees of its accredited officers, and should not be allowed with impunity to array themselves in opposition to their authority when properly exercised.

As to the position that Walker should have been allowed to enter into bond, &c: We think this was a matter addressed to the discretion of the chancellor. He was certainly not bound, as a matter of law, to allow a bond to be given, before he could order an arrest for contempt. If this were so, he might obtain bonds *ad infinitum*, without obtaining the money; for, if Walker may give bond, as a matter of right, for failing to comply with the decree requiring him to pay this money, he may give another when proceeded against upon the bond, and so on without end. Such is not the law. He answers that he has the money; if he has, he can readily hand it over to the receiver. In doing this, no right which he possesses will be affected without compensation. If, however, he has parted with the money since the order was made, this would furnish additional reason for his arrest, since it would amount

to a conversion of the fund in defiance of the decree, thus aggravating the contempt.

Upon the whole case, we feel well assured that the action of the chancellor is warranted by law and by the practice of the court, and we therefore refuse to award any process to annul or modify it. We have purposely avoided a decision upon the merits of this controversy, because such an opinion would be prematurely made on this preliminary motion, and is not called for as necessary in the decision of it.

Motion denied, with costs.

CAREY *vs.* McDOUGALD'S ADM'R.

1. Affidavits cannot be received in the Supreme Court, to contradict the certificate of a probate judge, as to the time when an appeal was taken from his decision; but when the officer only certifies that an appeal was taken on a specified day, and "that A. E. is the security of said appellant for the costs of said appeal," affidavits may be received to show that the security was not given at the time when the appeal was taken; and when such affidavits are filed, a special *certiorari* will be awarded, on motion, requiring the probate judge to certify the time when the security was executed and lodged in his office.
2. Security for the costs of an appeal cannot be taken in the Supreme Court; if the security is not given in the primary court, the appeal will be dismissed.

APPEAL from the Court of Probate of Russell.

THE appellant filed a claim against the estate of Daniel McDougald, deceased, which had been previously declared insolvent; and his claim having been rejected, he took an appeal from the decision of the probate judge. The probate judge, in his final certificate appended to the transcript, certifies that his decree was rendered on the 14th of March, 1853, "and that an appeal was taken on the 2d day of April, 1853, by the plaintiff in said cause, to the Supreme Court of the State of Alabama, from said decision, and that Allen Eiland

is the security of said appellant, for the costs which may accrue against him on said appeal."

The appellee now moves to dismiss the appeal, or for a special *certiorari* to perfect the certificate of the probate judge; and in support of his motion his counsel submit affidavits, which are met by counter affidavits on the part of the appellant's counsel. The motion does not appear to have been entered on the motion docket; but the opinions and briefs show what the motion was, and there is an entry on the minutes of the court awarding a special *certiorari* on motion of the appellee's counsel.

Saml. F. Rice, with whom was Geo. D. Hooper, for the motion:

The question is, whether any valid appeal was taken within thirty days after the determination of the issue. The existence or non-existence of a valid appeal must be determined under section 3041, in which there is a clear and positive prohibition against any and all appeals except those taken in the mode therein prescribed. The party may take an appeal by "giving bond to supersede the execution of the decree," or "security for the costs of such appeal, to be approved by the clerk," &c.; but he must make his election between the two modes, and actually perform one of those essentials, *before* an appeal can be taken by him: it is an essential pre-requisite to the existence of a valid appeal, that the party should give the prescribed bond, or give security for the costs to be approved as prescribed.—Langley v. Warner, 1 Comstock's R. 606; Parker's Appeal, 15 N. H. 24; 2 Greene's (Iowa) R. 91; 12 U. S. Dig. 44, § 179. If the prescribed bond or security is given after the day on which the appeal is taken, the appeal is not valid. It is certain that no such bond, nor any such security, was given in this case within thirty days after the rendition of the decree. The authority to approve the security is conferred by law on the clerk, register, or judge of probate, but upon no other person. This approval is a judicial act, and must be done at the time the appeal is taken: an approval after the appeal is void.—22 Ala. 361; 22 Vermont R. 632. Claiming an appeal according to statute, is not an appeal.—15 N. H. 24.

The clerk, register, or judge of probate, must certify the fact that an appeal was taken, and the time when, "as part of the record." The certificate to this transcript clearly shows, that the fact that an appeal had been taken, and the time when, is not "a part of the record" in the court below; that is stated as independent matter, not as matter of record.—Pickering v. Mizner, 4 Gilm. 334. There can be no valid appeal, without record evidence in the primary court of the fact, and of the time when it was taken. The certificate of the probate judge to the record is no part of the record of the court below.

The Supreme Court cannot, in any case, take an appeal bond, or security for the costs, nor allow it to be here taken. The law confers the power on the primary court alone. But if this court could, in any case, allow such bond or security to be here given, it would be a case where the time limited for appealing had not expired, and where the appellee made no objection, as in the case of Stevenson v. Reeves, at the last term. After the time for appealing has expired, the Supreme Court certainly has no power to allow such bond or security to be here given: to do so would be to violate the plain provisions of the statute, and extend the time fixed by law within which appeals may be taken. When the time for taking an appeal is fixed by statute, no court can extend the time, either directly or indirectly.—9 Paige 572; 10 *ib.* 615; 11 *ib.* 532.

An appeal, in a civil suit, is a proceeding unknown to the common law, and does not exist in a court of common-law jurisdiction unless expressly conferred by statute: when given, it must be regulated entirely by the provisions of the statute. 3 Bouv. Inst. 70; 7 Pick. 320; 3 Ham. 277; 6 Peters' Rep. 471, 777. In New Hampshire, there is a statutory provision, enabling the appellate court, on petition, to allow an appeal to any person who was "prevented from appealing," within the limited time, "by mistake, accident, or misfortune, and not by his own neglect."—15 N. H. 24. And in the amended code of New York there is a similar provision.—5 How. Prac. Rep. 310, 422. This amendment was suggested by certain decisions, referred to in the case last cited, which sustain the positions for which the appellee here contends, and admit the correctness of the decisions cited from 9th and 10th Paige,

supra. In our code there is no such provision; and this court, therefore, has no such power.

As the right of appeal is given only on the performance of certain specified conditions, there can be no valid appeal until those conditions are performed: nothing short of an entire performance of the condition can make the appeal effectual. Johnson v. Barber, 4 Gilm. R. 1; 18 Ala. 495; 2 Dall. 317. And as the *mode* is particularly prescribed by the statute, it must be strictly pursued.—5 How. Prac. R. 114; 15 N. H. 24; 4 Gilm. R. 1; 1 Comstock's Rep. 606; 6 Peters's Rep. 470, 777.

The failure of the party desiring the appeal to apply also for a citation to the appellee, is also fatal to the appeal in this case, as no citation has, in fact, been issued. The provisions of sections 3018, 3022, and 3020, clearly show that a citation is necessary; and must be returned to the Supreme Court, and that it is not the duty of the clerk to issue it unless "application" is made for it.—5 How. Prac. R. 114; Yeaton v. Lenox, 7 Peters' R. 220.

On such a motion as this, the certificate of the clerk is not conclusive to give this court jurisdiction, nor to prevent it from receiving other evidence, as to matters about which the record shown by the transcript is silent. If the certificate is evasive, artful, or incorrect, it surely ought not to be allowed to defeat the law: there must be some mode of exposing its incorrectness, and thus preventing parties from litigating in this court "in fraud of its jurisdiction."—22 Ala. 814; Bradford v. Bush, 10 *ib.* 274; Hall v. Hrabrowski, 9 *ib.* 278; 3 Phil. Ev. 799, 800.

WHITE & PARSONS, *contra:*

The judge of probate is authorized by law to grant the appeal, take the bond, and certify the fact that the appeal was taken, as well as the time when it was done; and this certificate becomes a part of the record, is conclusive of the facts stated in it, and gives this court jurisdiction of the cause.—Code, § 3016; Bartlett & Waring v. Lang, 2 Ala. 163; see, also, sections 1891, 1898, 1888, and 3041 of the Code, as to the authority of the clerk and the mode of taking appeals.—The Supreme Court cannot try a question of fact, nor indeed

any question, *de novo :* its jurisdiction is appellate only. How is the fact of an appeal to be ascertained, if the clerk's certificate is to be assailed. The appellant has the right to contest the statement " that there has been no appeal taken ;" and what tribunal is to try the question ? in what way is evidence to be taken? when heard? and how are witnesses to be examined? This court will not undertake to do it.—Weir v. Hoss, 6 Ala. 881.

Records import absolute verity, and cannot be contradicted.—3 Black. Com. 331 ; 1 Coke's Inst. 117, 260 ; Holford v. Alexander, 12 Ala. 280 ; 7 Cranch 484 ; 4 Paige 508 ; 19 Verm. 427 ; 17 *ib.* 302. Affidavits cannot be received to contradict the positive statements of the record.—Swartz v. Barnes, 11 Illinois R. 89 ; 16 Johns. 55 ; 2 M. & Sel. 566 ; Carroll v. Pathkiller, 3 Per. 252. The sheriff's return to process cannot be contradicted.—Clarke v. Gary, 11 Ala. 98 ; Small v. Ogden, 1 Litt. 16 ; Triggs v. Sims, 3 *ib.* 130. As between parties to process and their privies, the return is usually conclusive, and the party injured by the false return must resort to his action against the officer.—Phil. Ev. (C. & H.'s Notes), vol. 4, p. 798. In all the cases referred to by the opposing counsel, as sustaining their motion to dismiss for want of an appeal bond, the fact that there was no appeal bond appeared from an inspection of the record (15 N. H. 24 ; 22 Vermont 632 ; 2 Iowa R. 91), or else the case refers to a different question ; that is, whether the court can extend the time fixed by law for an appeal (10 Paige 615 ; 11 *ib.* 529). This question does not come up in this case, and the other point is concluded by the record showing that an appeal has been taken.

If these points are ruled against the appellant, then it is insisted, that he has done all that the law required of him : he prayed the appeal, and gave the bond required by the court ; and if there was any mistake, it was a mistake of the court, which should not be allowed to injure the appellant. A court of equity would reform the bond, so as to give the appellee all the remedies upon it which he would have had if regular.—Lavender v. Lee, 14 Ala. 688 ; Gray v. Hudson, 10 *ib.* 116.

It is not necessary, under section 3016 of the Code, that

the fact of an appeal being taken should be entered on the records of the court. Parties have three years within which to appeal. After the term of the court had expired at which a judgment was rendered, and the minutes had been signed, an appeal could not be entered on the minutes of that or any subsequent term, nor could it be entered at all. The clerk is directed to certify, not the record showing that an appeal was taken, but the fact "that an appeal was taken, and the time when, as part of the record; which certificate gives the Supreme Court jurisdiction."

CHILTON, C. J.—Appeals from the decisions of the probate judges, rejecting claims against insolvent estates, are required to be taken within thirty days from the determination of such issues.—Code, § 1888, clause 6. The issue, in this case, was determined against Carey, the appellant, rejecting his claims, on the 14th March, 1853; and the probate judge certifies, "that an appeal was taken on the 2d day of April, 1853, by the plaintiff in said cause, to the Supreme Court of the State of Alabama, from the decision of this court, and that Allen Eiland is the security of said plaintiff for the cost which may accrue against him (said plaintiff) on said appeal."

Affidavits have been filed in this court stating that, instead of an appeal, a writ of error, under the old practice, was sued out, and a writ of error bond was executed, within the thirty days, but no appeal was granted, and no security for cost, or bond to supersede the judgment, was given, as required by the Code.

The appellant, without waiving his objection to the reception of affidavits to contradict the judge's certificate, files, by his attorney, a counter affidavit; setting forth that he applied for an appeal within the thirty days allowed by section 1888, and the probate judge thereupon issued the writ of error, and took the bond above mentioned.

The first question is, can we receive affidavits to contradict the certificate of the probate judge, who certifies *that an appeal* was granted by him on the 2d of April; and this depends upon the construction to be placed upon section 3016 of the Code; which declares, that the "judge of probate must cer-

tify the fact that such appeal was taken, and the time when, as part of the record, which gives the Supreme Court jurisdiction of the case." As the certificate of the fact that an appeal was taken, and the time when it was so taken, is made a part of the record in the cause, and the basis of the jurisdiction of this court over it, we do not well perceive how it can be open to controversy, more than any other portion of the record of which it forms a part. True, the clerk, register, or judge of probate, in giving a certificate, acts as a ministerial officer—the custodian of the records of their respective courts; but it is competent for the Legislature to declare the effect which their certificates shall have, and to place them upon the same footing with records, which import absolute verity, and may not be controverted except for fraud. Such, we think, is the effect of the section above quoted.

But section 3041 declares, that "no appeal can be taken, without giving bond to supersede the execution of the judgment or decree, unless the appellant give security for the costs of such appeal, to be approved by the clerk, register, or judge of probate; the names of such securities to be certified with the record to the appellate court," &c.; and it is stated in the affidavits, that no security for the costs of the appeal, or bond to supersede, was given within the thirty days, and that no security, or bond of any kind, save the writ of error bond above mentioned, was given before the middle of June, 1853.

It will be observed, that the certificate of Judge Tate does not say that any security for the costs of the appeal was given before, or contemporaneously with, the granting of the appeal, but merely "that Allen Eiland is the security of the said plaintiff," &c.; that is, Mr. Eiland was, at the time of making his certificate, namely, on the 23d day of July, 1853, the security for the cost.

The section of the Code last above quoted (3041) is peremptory, and inhibits the granting of any appeal, without bond to supersede, or security for cost. The appeal cannot lawfully be taken without this, and if taken, cannot avail as such. It therefore becomes important, in this aspect of the case, to know when the security for cost was given, and this fact is not shown by the record. It is a fact outside of it, the proof of which does not in any way contradict, but is in aid

of the record, supplying an omission which is necessary to be supplied in order that it may have its proper legal effect, whether as showing that the appeal is valid or invalid.

We fully concur with the counsel for the appellant, that no one should be allowed to falsify the record. This is an elementary rule. So, if the sheriff returns *summoned*, the party shall not be heard to say that he *was not summoned*, for he cannot contradict the return of the sheriff. Such has been the settled law from the time of the Year Books.—See 21 H. vi, 42; 7 H. vii, 4, cited in Viner's Abr., vol. 18, p. 173. But conceding this rule, Viner calls us to note a diversity, and says: "But a man may say that which stands with the return; as to say he was not summoned according to the law of the land, or not attached by fifteen days; or he may assign error in a thing apparent, or matter in fact out of the record; but shall not falsify the record." Here it is insisted, that a necessary step to a valid appeal is wanting—that, without which, "no appeal can be taken"—security for the cost of it.

It is claimed by the appellant, that he should be allowed to give security in this court, and that, by analogy to previous decisions under our old statutes upon the matter of appeals from justices, &c., we should not dismiss the appeal, when the party is willing to furnish the requisite security.

It is supposed, that in the case of Stevenson v. Reeves, at the last term, we furnished a precedent which would justify this view; but this is a mistake. In that case, the security was given by the consent of counsel on both sides, and the question was not discussed or decided. We think it clear, that it was not in the contemplation of the Legislature to allow this court to take the security. It must be "approved by the clerk, register, or judge of probate." It is, moreover, apparent, we think, from the tenor of our present Code, and especially from section 3041, that the Legislature not only designed to secure the officers of court their costs, but to discourage appeals, which protract litigation oftentimes more to the injury of the parties litigant than to the advancement of justice. When we consider how often such appeals embarrass and delay the final settlement of estates, the wisdom of this policy becomes manifest. The case of Langley *et al.* v. Warner, 1 Coms. R. 606, goes strongly to sustain the view

we have here taken. That decision was made upon a section of the New York Code nearly similar to the one we have been considering, and the court held, that "to render an appeal effectual for any purpose, there must be an undertaking that the appellant will pay all cost," &c. ; and it was added, that "a court of review ought not to encourage appeals."

Without now deciding that we will allow affidavits to controvert the certificate of the judge that a bond to supersede, or security for cost, was given when the appeal was taken, and reserving that question until it shall necessarily arise, we are of opinion, that the better practice is, to send down a *certiorari* to the judge of probate, requiring him to certify to this court when the security for the cost of the appeal was executed and lodged in his office, so that, the record being complete, such further order may be made as shall conform to the views above expressed.

A *certiorari* will accordingly be awarded.

NOTE BY REPORTER.—The appellant, by his counsel, afterwards applied for a re-consideration or modification of the foregoing opinion, so far as to allow him to give a proper legal bond, either in this or the primary court, as this court might direct. The argument of his counsel on this application, and the opinion of the court in response to it, are as follows:

WHITE & PARSONS, for the appellant:

The jurisdiction of this court does not depend on a bond being given to secure costs. That section of the Code which authorizes appeals in this and all other cases, provides, "the certificate must show that such appeal was taken, and the time when, as part of the record, which gives the Supreme Court jurisdiction of the case."—Code, § 3016. Two things only are necessary to the jurisdiction of the court, viz., that the party made application for an appeal, and within the time prescribed by law. It is also worthy of note, that this section of the Code secures this to the party "as matter of right."

We insist there is nothing in the language of the Code, on the subject of appeals, which renders it either necessary or proper for this court to depart from the long established

practice in relation to appeals, under the provisions of the old statutes from the decisions of justices of the peace. The language of the old law is: "Any person may, within five days thereafter, appeal to the next circuit or county court, first giving to such justice bond with good security."—Clay's Digest 314, § 9. Here, by the express language of the act, the giving of bond and security is made the first in the order of events; yet this court has invariably held, that the appeal could not be dismissed because the bond was informally or inartificially taken by the justice.—Jenkins v. Canley, 1 Stew. 61; Payne v. Martin, *ib.* 407–410. These cases settled the practice at an early day in this State, and this court has never departed from the spirit and letter of the decisions. Carter v. Pickard, 11 Ala. 673; Alford v. Johnson, 9 Por. 320; Lowry v. Stowe, 7 Por. 486; McLellan v. Allison, 19 Ala. 671. There are other decisions which can be produced, if required, showing a long and unbroken acquiescence in the above construction given to the language of the old statute.

Let us now consider the language of the Code on this point. "In all other cases, * * the appellant, or some one for him, must give security for the costs of such appeal, to be approved by the judge of probate or clerk of the circuit court, as the case may be."—Code, § 1898. Is not the language here employed less stringent than that of the old law? It merely declares, that "security must be given for the costs of such appeal," but it does not make the jurisdiction of the court depend on its being given in the first instance, much less does it declare that where a party, as "matter of right," claims an appeal within the time prescribed by law, and attempts to give bond and security, also within the time, that he shall not have the benefit of his appeal if he makes any mistake in giving a bond in proper form. Yet this is what the court is asked to hold.

This section of the Code does not say when the security must be given; and for anything in the language employed, if it is given by the time the clerk or judge of probate is ready to certify the record, it would seem to be sufficient, for the Code only requires the officer "to certify the names of such securities, with the record, to the appellate court."—§ 1898. The law itself declares the object in requiring this bond is to

"give security for the costs of such appeal." Does not this strengthen the view just presented, that as the Code does not say when it shall be given, but does declare the object for which it is given, that if the bond is given in time to enable the clerk or judge to certify the names of the securities with the record, and thus afford the contemplated security for costs, that the law is complied with in its letter and spirit?

This court has repeatedly held, that when the Legislature, in passing an act, employed the language, or nearly so, of an English act, which had received a judicial construction by the courts of that country, that the Legislature must be understood as adopting that construction, and to have been governed by it in the passage of the act. Let us apply this well-settled rule of construction to the legislation now in question. The reasons for doing so are at least as strong, if not much stronger. Both systems are our own legislation. The old law has received a long and unbroken chain of construction, on a question of practice, which is eminently proper, when we consider the inefficient character of many of our subordinate courts, and that the ends of justice would be frequently defeated if any other were adopted.

Again ; although the law providing for the codification of the statutes of this State gave the commissioners "full latitude and authority" to revise, reform, &c., it seems that they did not think any revision or reformation on this head necessary; for in providing for appeals, they employ the language of the old statute in reference to them, but shorten the period, in order to expedite the settlement of estates, in which they may be taken. This and requiring security for "costs of said appeal" are the only changes made by the commissioners. The question, then, is, whether a change, designed to expedite trials, and to secure costs, should be construed into an intention to "discourage appeals," when the Code declares an appeal is "matter of right," and in providing for security being given, uses language less stringent, as we have already seen, than the old law employs. We cannot come to this conclusion. It seems to us to be at war with well-settled rules of construction, a long and unbroken chain of decisions, and the letter as well as the spirit of the Code.

The idea that the Legislature, or this court, should "dis-

courage appeals" is in conflict with the second section of the fifth article of the constitution. The Supreme Court is established for the express purpose of exercising appellate jurisdiction; and the power to issue writs of injunction, &c., together with such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions, is secured to it by the constitution itself. How, then, can it be said with propriety, the Legislature intended to discourage the very thing for which this court was established? Would it be proper so to construe a law as to defeat the very thing the constitution had in view in creating the court and in providing for the exercise of its powers? It is said by Blackstone, that there are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy.—Com., vol. 1, p. 60; 3 Rep. 7. By the old law, the party had a right to his writ of error in three years, and that too without giving security for costs of this court. What did the Legislature regard as the mischief? If we look to what they have themselves declared, we shall be at no loss to determine. It is clear that, as to all appeal cases, they thought security for costs of appeal should be given; and as to that class of cases under consideration, the interest of the estate and of other creditors demanded an appeal should be taken in thirty days, and they changed the law in these respects. Is this evidence of an intention to discourage appeals? If so, why not declare the intention, at once?

To refuse a party, who has claimed his appeal within the time prescribed by law, the right to correct an error in the mode or manner of giving security for the costs of the appeal, would be, in effect, to declare that, although this is an appellate court, and although he has claimed his appeal in time, he will not be allowed an appeal if there is any, the least error, on the part of the judge or clerk before whom he took it, because the Legislature intended to discourage appeals. If the judge or clerk should refuse to grant the appeal, or allow the party to take it, the effect is still the same; the party must lose his "right" secured to him by the law of the land.

The petitioner plants himself, with great confidence, upon the fact that he claimed an appeal within time, and offered to

give the requisite security; and he now prays this court to give the law such a construction as will secure his "right" to a hearing. No harm can result from this course, but much good, for it will secure, not merely to this petitioner, but all others, the opportunity of correcting a mere clerical error in a subordinate officer.

It was the duty of a clerk to issue writs of *ad quod damnum;* and an error of the clerk cannot have the effect to prejudice the right of a party suing out such a writ. Clay's Dig., p. 376; Hendricks v. Johnson, 6 Por. 473-4. In Johnson v. Hale, 3 S. & P. 334, this court held, that if an appeal was prayed for within five days, and the bond executed at any time before the issuance of an execution, it would be in time and sufficient.

CHILTON, C. J.—The points which are decided in the opinion heretofore delivered in this case, being for the first time before this court, and of much practical importance, we have given to the argument and authorities cited, on behalf of the appellant, for a re-hearing or modification of the opinion, a patient, and, we trust, thorough investigation.

It is insisted by the appellant's counsel, that the object of the provisions of the Code requiring security for costs of the appeal (§ 1898), and declaring that "no appeal can be taken without giving bond," &c., or "security for the cost of the appeal," was merely to secure the payment of the cost; and that the reason on which this court has based repeated decisions upon the old law, sanctioning the practice of supplying in the primary courts defective bonds on appeals from justices, attachment, detinue and claim bonds, applies with equal force to this court; and, as these decisions are departures from the letter of the statute, requiring such bonds to effectuate the intention, we should, in like manner, and for a similar reason, depart from the letter of the provisions under consideration, and allow security to be here given. To rule differently, it is said, would be to prescribe one rule for the primary courts, and hold to a different rule in this court, without reason for the difference.

Let us briefly examine this position. Appeals from justices of the peace are to be tried in the appellate court *de novo;* in other words, the appeal, in such case, is but a mode

of bringing the cause and the parties into the Circuit Court, to be proceeded with, as respects the trial, as though it had originated in that court. And as to the proceedings in detinue, trial of the right of property, and attachment suits, the primary court has original jurisdiction; and having original jurisdiction, it may take cognizance of every fact, and try and determine all issues of fact, which may legitimately arise in the progress of the cause, which may be necessary to the complete determination of the cause, and the proper administration of justice and right between the parties. If an insufficient bond has been given, in cases where a good bond is required by law, the court, in the exercise of its original jurisdiction, has power to order a good bond to be given. It can, moreover, test any issue which may be raised, as to the solvency of the obligors; and if that court takes an informal bond, to secure the cost, in cases where such security is necessary to enable a plaintiff to prosecute a suit, and refuses to dismiss the suit, or to require a good one, this court could interfere by *mandamus* to compel the Circuit Court to proceed and dismiss the suit, or require a good bond.—Barnett & Hutchison v. Warren, Hardin's Rep. 172. It is manifest, then, that the giving or supplying such bonds, by the order of the court, is a matter of original jurisdiction, which can be, and often has been, made the subject of revision in this court.

So much for the jurisdiction of the primary courts in substituting new bonds or security. Now the argument is, that, as they exercise this power, this court must do so, having sanctioned that exercise by them. But the counsel lose sight altogether of the distinction between a court of original and one of appellate jurisdiction. The constitution of this State expressly declares, that this court, except in cases otherwise provided by it, "shall have appellate jurisdiction only." The taking of bonds or security for costs, is no where made an exception in the constitution, but is expressly delegated by law to the primary courts, or to the ministerial officers of those courts. How then, without a disregard of our official obligation, could we exercise jurisdiction in taking such bond or security?

If the clerk, register, &c., shall take insufficient security, they are in certain events liable to the party injured thereby

(Code, § 3021); but who shall respond, if insufficient security shall be taken in this court, and how shall its sufficiency be tested? No mode is provided by which it can be done, for the simple reason that it was never contemplated that it should be done. But the clerk, &c., may swear the sureties as to their solvency (Code, § 3021). If a ministerial officer, or the court below, takes an informal bond, which is adjudged sufficient by the primary court, its judgment may be reversed, or, in some cases, as we have seen, its action may be controlled by *mandamus* in this court. This right of review, in the language of the appellant's counsel, "attaches to, and is inherent in, every party to such judgment," &c. Of this right, however, the suitor is deprived, whenever this court assumes original instead of appellate jurisdiction over such matters; for who shall control or revise the action of this court, in the performance of this supposed duty, should an informal or insufficient bond be taken? No one. Then the right of appeal or revision, in reference to the taking of the bond or security, is gone,—is taken away by the exercise, on the part of this court, of original jurisdiction.

Suppose judgment be rendered in the court below for a large sum, and the defendant, with the Code in his hand, goes to the probate judge and demands an appeal, and thereupon he executes a writ of error bond (say in the penalty of fifty or an hundred thousand dollars), to supersede the execution of the decree, and the judge issues a writ of error, instead of certifying an appeal; that this writ of error should be dismissed, or rather treated as a nullity, and the cause ordered to be stricken from the docket of this court; that the probate judge should then certify that an appeal was granted within the time prescribed by law, and should send up the writ of error bond as a compliance with section 3019 of the Code,—the sureties have the right to stand upon the terms of their contract; and their undertaking is, for the prosecution of *the writ of error* to effect by their principal, &c. The bond, then, would clearly furnish no security upon an *appeal under the Code.* Now, conceding that we had power to take a good bond, how shall we proceed? We are not, like the officers charged with that duty, familiar with the pecuniary condition of the parties offered as sureties, and

who, from the contiguity of their residence, may be presumed well calculated to judge of their solvency. Besides, it would be extremely inconvenient for persons to come from distant portions of the State to execute such bonds before us. If we send down to the probate judge to take a bond or security, conceding that we had power to do so, here delay might ensue and enure to the appellant, whose laches, in failing to tender sufficient security, causes it, and the object of the statute requiring a speedy determination of the matter of appeal be defeated.

Without intimating any dissatisfaction with the decisions allowing bonds to given in the primary courts possessing original jurisdiction, we are satisfied such decisions are wholly inapplicable to this, an appellate court merely.

But to recur to the statute: Section 1898 of the Code requires security for costs to be given, and the names of the securities to be certified by the probate judge, in cases of the kind before us. Section 3041 is general in its terms, and applies to this, as to all other cases of appeal, and declares that "No appeal can be taken without bond." &c., or "security for costs of the appeal, to be approved by the clerk, register, or judge of probate." &c. Here is a plain, simple, unambiguous declaration of the legislative intention that an appeal shall not be taken without security for costs. We are aware of no rule of construction, which would authorize us in holding that an appeal can be taken without security, when the Legislature, in the most simple, unambiguous terms, declares that no appeal can be so taken. Mr. Dwarris, in his excellent treatise on Statutes, says: "Where the Legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what it has expressed. * * The fittest course, in all cases where the intention of the Legislature is brought in question, is, to adhere to the words of the statute, construing them according to their nature and import in the order in which they stand in the act. The most experienced and enlightened judges have for some time lamented the too frequent departure from the words of the act by which a case is governed, and themselves hold it much the safer course to adhere to the words of the statute,

construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the parties who framed the act. * * They are not to *presume* the intentions of the Legislature, but to *collect them* from the words of the act, they having nothing to do with the policy of the law." "This," he adds, "is the true sense in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct by the crooked cord of discretion, but by the golden met-wand of the law."—Dwarris on Statutes, 703.

It may be that the Legislature intended solely by this provision to secure the officers of court; but concede that such was the design, yet it would be clearly competent for that body to make the giving of such security an indispensable pre-requisite to a valid appeal, without which "no appeal can be taken."

If the appeal could avail for any purpose, without security, then it would be in the power of the parties, or their attorneys, to dispense by consent with security in any case; and this furnishes a substantial reason, as we think, for making the requirement peremptory, for the officers of court might otherwise go unsecured in their cost.

We think, furthermore, that it may well be presumed that the Legislature intended this provision for securing the costs as a check upon frivolous or unfounded appeals, which, without it, might be resorted to by litigious insolvents with impunity, to the embarrassment and prejudice of good citizens, and, it may be, as the means of obtaining money as the price of their peace. We would not be understood as intimating that the case under consideration is of that character; we know it is not.

An examination of the authorities will show, that the practice we here adopt obtained in New York under a similar statute (1 Coms. 606), in Kentucky under a statute less stringent in its requisitions (7 Mon. 117; 3 Dana 46), in Illinois (4 Gilm. 334), in Virginia (7 Gratt. 374), and indeed in every State where we can find the question has been made upon analogous statutes.

We have but to add, from a more thorough investigation, that we have increased confidence in the correctness of our former opinion, to which we adhere.

SHUMAKE *vs.* NELMS' ADM'R.

1. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict, and therefore the judgment is conclusive that they were recovered: and the fact that the action was against a tenant whose term expired before the rendition of the judgment, if his landlord was made a party, makes no difference.
2. After a recovery in trespass to try titles, trespass for the mesne profits accruing after the rendition of the judgment and before the execution of the writ of possession, lies against the defendant in the first action, or against any one coming into possession under him; but if the tenant, in such case, comes into possession under an express promise to pay rent to the defendant, the plaintiff cannot maintain *assumpsit* for use and occupation against him.
3. A recovery in ejectment, or in trespass to try titles, is conclusive between the parties and their privies, as to the title of the plaintiff's lessor, in a subsequent action for the rents and profits.

ERROR to the Circuit Court of Perry.
Tried before the Hon. JOHN D. PHELAN.

ASSUMPSIT for the use and occupation of a certain house and lot in the town of Marion during the year 1846. It appears from the bill of exceptions, that the plaintiff offered evidence tending to prove that the defendant occupied the house and lot described in the declaration from the middle of March, 1846, to the first of January, 1847, and that the annual rent was worth from $125 to $130; and he then offered in evidence the writ and other papers in a certain action of trespass brought by him, in the Circuit Court of Perry, against one C. M. High, on the 22d October, 1845, as well to try the titles to the said premises, as also to recover damages for their detention, and then proved that said High was the tenant of A. C. McKeen and Lucinda McKeen, who had rented the premises to him during the year 1845. The defendant then showed by the record of said action of trespass, that the said McKeens voluntarily appeared, and were made parties defendants to that action as landlords of said High, and had defended the suit; and he then read the judgment entry, in that action, showing a verdict and judgment for the plaintiff for $142 25, which was rendered on the 12th November, 1846. To all this evidence no objection was made.

"The plaintiff, in order to show that no damages had been recovered for the time the premises were occupied by the defendant, then offered to prove that the jury, in said action against High, brought in a verdict for between $500 and $600; the defendant objected to the introduction of this evidence, but the court overruled the objection, and the defendant excepted. The plaintiff then proved that said jury did return a verdict for heavier damages as aforesaid, and that the presiding judge intimated that damages could only be regularly assessed against the defendants for the time said premises were occupied by said High, which was something more than a year, and before the time when defendant occupied; and thereupon the plaintiff, by his counsel, consented in open court that the damages assessed by the jury should be for the rent of said premises for the time they were occupied by said High, and the verdict was accordingly reduced to the sum named in the judgment. To the introduction of this evidence the defendant also objected; but his objection was overruled, and he excepted.

"The plaintiff further proved that, while said Shumake was in possession of said premises, or shortly after he went out of the possession thereof, plaintiff gave him notice that he claimed the rent due for the year 1846, and notified defendant not to pay it to said McKeens or their agent; that defendant then stated, that he had given his note for the rent to the said McKeens, and that he was willing to pay said rent to whomsoever it was legally due, and that all he wanted was not to be compelled to pay it twice; that the said suit against the McKeens was then pending, and that this was known to Shumake. The defendant then proved that he had rented the said premises from Hugh Davis, Esq., as the agent of said McKeens, and had given his note for the rent, payable to them;" he also introduced the note in evidence, at the bottom of which was the following memorandum: "N. B. My rent is to stop if I be turned out of possession by McKeens' loss of the lot in virtue of the proceedings at law." Defendant then "offered evidence tending to prove that he occupied said premises as the tenant of said McKeens, and not as the tenant of said Nelms; also, that on the trial of said suit against High and the McKeens, evidence was offered tending to show

the value of the rent of said premises for several years prior and up to the said trial, and thereupon the jury gave damages for $500 or $600 for said rent; and the presiding judge then deciding that not more than one year's damages or rent could be recovered in that action against the parties thereto, the said verdict was made in conformity to such decision, and the plaintiff, though present, took no exception to said ruling, and consented to said amendment of said verdict." He also proved, that the judgment in that action was stayed by a writ of error bond, and was not affirmed by the Supreme Court until long after he had gone out of possession of said premises; and he then offered in evidence the writ and declaration in a suit brought against him on said note, which was then standing on the trial docket of the court. "He then offered to prove, that the plaintiff relied for title on a deed from the sheriff of Perry county; that the execution under which he purchased said premises, and by virtue of which he obtained said deed, was issued in favor of a plaintiff who had died long before the issue of said execution; that his said deed was null, and of no validity whatever, and therefore plaintiff had no title to said lot; to the introduction of which evidence plaintiff objected, and the court sustained the objection, and the defendant excepted."

"The above is the substance of all the evidence offered, and no other was offered to show that the defendant held under, or owed said rent, or had promised to pay the same to the plaintiff; and there was no conflict of testimony on any point involved in the case."

"On this state of proof, the defendant, by his counsel, contended before the court, 1st, that the action of *assumpsit* did not lie; and, 2d, that the plaintiff was estopped and barred from recovering against defendant in this action by the judgment in said action against said High and McKeens. But the court charged the jury, that the notice given by plaintiff to defendant of his claim to the rents, and the conversation between them as set forth, would authorize him to maintain this action; and that he, in consequence of having (*given?*) said notice, was entitled to recover the rent of said premises from defendant, for the whole time that he occupied the same. To this charge the defendant excepted, and asked the court

to charge the jury, that if they should find that defendant rented said lot from McKeens, through their agent, and gave his note for the same, and that he occupied the same as their tenant from the time he first went into possession thereof until his term expired, then the plaintiff could not maintain this action, notwithstanding the said notice to defendant and his declaration as above stated. The court refused to give this charge, and the defendant excepted."

"The defendant also asked the court to charge, that plaintiff was estopped from maintaining this suit, by the judgment in the said case against High and McKeens; which charge the court refused to give, and the defendant excepted. The defendant further asked the court to charge, that upon the evidence adduced in this case, plaintiff could not recover in this action; which charge the court refused to give, and charged the jury, that, if they believed the evidence, plaintiff could well maintain this action, and that the plaintiffs in said suit on said note could not maintain their action; to which refusal, and to the charge given, the defendant excepted."

The several rulings of the court, as shown and excepted to in the bill of exceptions, are now assigned for error.

I. W. Garrott, for the plaintiff in error:

1. The evidence offered by plaintiff below, as to the verdict of the jury and the action of the court in the case of said plaintiff against High and the McKeens, was illegal. Shumake was not a party to that case, and in no way bound by the proceedings therein; and if he was privy in estate to the McKeens (which is conceded), then the evidence was also illegal, because irrelevant, and calculated to mislead the jury. Besides, the proceedings of courts of record can only be made to appear by their records, and if the unfinished deliberations of a court and jury, or either, can be given in evidence, where is such principle to stop?

2. The evidence offered by Shumake to show that Nelms had no title to the lot, was proper, and should have been admitted. If he was privy to the McKeens, then he alone, or together with them, had the right to resist a recovery, notwithstanding the former recovery by Nelms.—Camp v. Forest *et al.*, 13 Ala. 114. If he was not privy, he had a right to show it, as he was not tenant to Nelms.

3. In the charges and refusals to charge, the court erred. Shumake was the tenant of the McKeens, and not of Nelms. Nelms had recovered rents from the McKeens, who were Shumake's landlords; if he recovers also from Shumake, the tenant, he recovers twice for the same rents, and the McKeens could never recover rent at all from their own tenant, unless he could be compelled to pay twice. Shumake, being the tenant of McKeens, cannot dispute their title: he must therefore pay them, and it follows that he ought not to pay Nelms. The action of *assumpsit* does not lie in such a case. There was no demise from Nelms to Shumake, no contract in any way for the rents; and this action for use and occupation cannot be sustained in the absence of a demise, or a contract express or implied to pay rent.—Bell v. Ellis' Heirs, 1 S. & P. 294; Hays v. Goree, 4 *ib.* 170; Bisquay v. Jeunelot, 10 Ala. 245, 248; Ex'rs of Smith v. Houston, 16 *ib.* 111; Loyd v. Hough, 1 How. (U. S.) Rep. 153, 158-9, 160; Henwood v. Cheeseman, 3 S. & R. 500.

4. If a plaintiff brings an action of ejectment or trespass to try title against a tenant for a term, he can recover such damages as may accrue up to the trial, notwithstanding the tenant has gone out of possession. If he does not so recover, he could bring several suits to recover the damages accruing during the progress of the suit.

5. The court should have given the charge asked for—that upon all the evidence adduced, the plaintiff could not recover. All the evidence is set out in the record, and in all of it there is not one particle of proof to show any contract, express or implied, to pay rent to Nelms, but the reverse.

The charge that plaintiff could recover for the whole time defendant was in possession, was directly against the case of McGehee v. Cummings, 9 Por. 349.

J. R. John and A. B. Moore, *contra*:

1. The plaintiff in error held the lot as the property of another, not as his own, during the pendency of a suit for its recovery, with notice of the suit, and promised to pay to whomsoever it might properly belong. The facts shown in the record sustain the action: therefore, the charge of the court was correct.

2. The first charge asked by the defendant below was properly refused. Shumake could not set up a tenancy under a landlord who had no title, and thereby defeat the rightful owner. Shumake could have no better title than McKeen and wife, under whom he went into possession: They had none; consequently, a tenancy under them would not bar this action for the rent.

3. Whilst it is conceded that trespass is the usual, and in some instances the only remedy to recover mense profits, yet it is insisted, with confidence in the position, that the facts of this case bring it clearly within the principles which, by the decisions of this court, govern the action of *assumpsit* for use and occupation.—Davidson v. Earnest, 7 Ala. 822; Ex'rs of Smith v. Houston, 16 *ib.* 111; Catterlin v. Spinks, 16 *ib.* 467.

4. The promise in this case to pay to the rightful owner is sufficient to support *assumpsit*, by showing, as is done by the record, that Nelms was the true owner and the person to whom the promise was made.

5. In an action of ejectment, or trespass to try titles, each occupant is liable only for the actual time he occupies, and damages for a longer period cannot be assessed against him; and where the defendant in such a suit gives up the possession to a third person, such third person becomes liable for the mesne profits to the extent of the time he occupies, if the plaintiff recovers, in a separate suit by the plaintiff against him.—Sedgwick on the Measure of Dam. 127; Holcomb v. Rawlins, Cro. Eliz. 540; Morgan v. Varick, 8 Wend. 587; Jackson v. Stone, 13 John. 447.

6. Nelms could, therefore, only recover from High for one year's rent by his suit; he could not in that suit recover anything from Shumake, because he was not a party. But Shumake, being a third person, and taking the premises from the defendant, is liable for mesne profits, and by his promise liable to the plaintiff in this form of action. Consequently, the judgment against McKeen and wife and High was no bar to this action.

7. But if it had been legal and proper to take judgment against McKeen and wife and High for the entire amount of damages, and if the judgment had been actually rendered thus, Shumake could not plead it in bar of his liability, with-

out also showing that the judgment thus rendered had been satisfied: and it is doubtful whether such a judgment and satisfaction would be a bar. If it were otherwise, an insolvent man might oust the true owner, and by under-letting to solvent men, make the damages clear. This cannot be the rule of law.

8. These positions show, that the court was correct in refusing to charge that the plaintiff was estopped from maintaining this suit by his judgment against McKeen and wife and High.

9. It is well settled, that a recovery in an action of ejectment is conclusive on the defendant and all claiming under the defendant in an action for the mesne profits; and with us, the rule must be the same as to recoveries in actions of trespass to try titles.—Jackson v. Stone, 13 John. 448; Morgan v. Varick, 8 Wend. 598.

10. If the above position be correct, then the record of the judgment against McKeen and wife and High was competent evidence against the defendant in this suit; for a judgment is evidence against the parties and all claiming under them.—Dewy v. Osborne, 4 Cow. 339; 2 Phillips' Ev., p. 6, ch. 1, § 1, 6 Am. from 7 Lon. ed.

11. Although a judgment in ejectment, or trespass to try titles, might not bind a landlord who had no notice of the suit, yet it is clear, if the landlord be made a party, or have notice of the suit against his tenant, even if he do not become a party on the record, he is bound by the judgment, and consequently all claiming under him will be equally bound. McKeen and wife were parties to the suit to try titles; and if it were conceded that they were improper parties, Shumake could not take advantage of that irregularity; but if he could, still McKeen and wife had notice, and the judgment against High is conclusive on them, and being conclusive on them, is good evidence against Shumake, who went into possession of the premises in question under them.

12. There was no error in the admission of the testimony offered by the plaintiff in regard to the finding of the jury. It was not designed to alter or impair the verdict, but to establish facts outside of the verdict, which could well be done. But if it were erroneous, the error was cured by the defend-

ant subsequently introducing the same testimony in substance, as shown by the record. If there were error, and it was not cured by the defendant's introducing the same testimony, the record shows that the defendant below could not be injured.

13. There was no error in excluding the proof offered by Shumake of the pendency of the suit of McKeen and wife against him for the rent. Nelms could not be affected by that proceeding; neither could Shumake call in question the correctness of the judgment between Nelms and McKeen and wife and High; that judgment concluded him, because he took possession under McKeen and wife; he could not impeach it, so long as it remained unreversed. Nor could he impeach Nelms' title to the lot, he being bound by the adjudication of that question in the suit of Nelms v. High, McKeen and wife. It therefore follows, that all the testimony offered by Shumake, tending to impeach either the judgment or Nelms' title, was illegal, and correctly ruled out.

GOLDTHWAITE, J.—The first question is, whether Nelms, in his action of trespass to try titles, could have recovered in damages the rents of the land accruing up to the time of the verdict in that action; and we are clear that he could. The object of the act of 1821 (Clay's Dig. 320, § § 43, 44, 45) was, to give the owner of lands a remedy to recover possession in the action of trespass, and in the same proceeding to recover damages and costs; and hence in Cummings v. McGehee, 9 Porter 349, it was held by this court, that an action for *mesne* profits, accruing previous to the rendition of judgment in an action of trespass to try titles, could not be maintained. It can make no difference, that the action was commenced against a tenant whose term expired before the rendition of the judgment, if the landlord was made a party to the suit, and his possession continued up to the time of the verdict, as we held in Rowland v. Ladiga, 21 Ala. 9, that the defendants might protect themselves in this action from a joint judgment for damages, by showing the character and extent of their separate possessions. Upon this authority, if A and B were sued, A could show that he and B held jointly but a portion of the lands sued for; and the plaintiff, in such a case, would be entitled to a joint verdict against them, for

the value of such possession, and he also would be entitled to a verdict against B alone, for the damages resulting from the occupation of the remaining portion by him. In the particular case referred to, the decision was made with reference to the occupancy of distinct portions of the land by the defendants; but the principle is equally applicable to the time of possession, being founded on the rule which obtains in the action for *mesne* profits, which holds each occupant responsible only for the length of time he has been in possession.—Holcomb v. Rawlins, Cro. Eliz. 540; Morgan v. Varick, 8 Wend. 587. The plaintiff Nelms was, therefore, entitled to have recovered in his action to which the McKeens were a party damages covering the possession of the land sued for up to the verdict, and for that reason the judgment in that action was conclusive upon that point (Cummings v. McGehee, *supra*); and the evidence showing that damages were not recovered up to that time, was improperly admitted; and as the record shows these damages were paid, they could not, for that reason, be recovered a second time.

For the error we have noticed the judgment must be reversed; but it is necessary that some of the questions presented upon the record should be decided, in order that the case may be proceeded with correctly on another trial.

We have held, that after a recovery in trespass to try titles, trespass for the *mesne* profits accruing for the period intervening between the recovery of the judgment and the execution of the writ of possession, would lie against the defendant in the first action; and we think it clear, also, that this action may be maintained against any one coming into possession under the defendant, for the length of time he occupies.—Holcomb v. Rawlins, *supra;* Jackson v. Stone, 13 Johns. R. 447; Morgan v. Varick, *supra*. Hence it follows, that the value of the possession of the lands by Shumake, subsequent to the verdict in the suit of Nelms against the McKeens, would be recoverable in an action of trespass for the *mesne* profits.—But the question here is, whether it can be recovered in an action for use and occupation. In Hull v. Vaughan, 6 Price's Exch. Rep. 157, the facts in evidence, as understood by the court, were: that Hull was entitled to the possession, and at the instance of Vaughan gave it up to him, supposing that he

was entitled to it; and it was held, that the law raised an *assumpsit* in favor of Hull, the real owner, for the use and occupation. Catterlin v. Spinks, 16 Ala. 467, was decided upon the authority of the case in Exchequer, and both the cases were based upon the principles of the common law, applied, it seems to me, with very great liberality, to meet the obvious justice of the case; it being supposed that no recovery of the rents could be had, unless in the form of action adopted. Each of these cases rests entirely upon the doctrine of implied *assumpsit*. In the case before us, however, the evidence shows, that Shumake rented the premises from the McKeens, and expressly promised to pay the rent to them; and upon this evidence, standing by itself, we do not think the plaintiff could recover for use and occupation, as an implied *assumpsit* to one cannot be raised in the face of an express promise to another for the same consideration.—Whiting v. Sullivan, 7 Mass. 107; Jewett v. Somersett, 1 Greenl. 125.

If, however, there was an express promise, made by Shumake during the pendency of the action of trespass to try titles, and while in possession of the land, to pay High the rent, it is clear that, under the authority of Smith v. Houston, 16 Ala., the latter would be entitled to recover the rent accruing after the suit in this form of action.

The evidence on the part of Shumake, to show that Nelms had no title to the premises, was properly rejected. The rule is, that the recovery in ejectment is conclusive between parties and privies, as to the title of the lessor of the plaintiff, in trespass for the *mesne* profits, (Benson v. Matsdorf, 2 John. 369; Baron v. Abeel, 3 Johns. 481; Jackson v. Stone, 13 Johns. 540; Leland v. Tousey, 6 Hill 328); and the same principle would apply to all cases, except an ejectment or trespass to try titles.—Van Wyck v. Seward, 1 Edw. Ch. 327. Here, the record shows that Shumake rented from the McKeens during the pendency of the suit against them to try titles; he was, therefore, privy in estate to them, and bound by the recovery against them.—Howard v. Kennedy, 4 Ala. R. 592.

Judgment reversed, and cause remanded.

BRIDGES & CO., ET AL., *vs.* PHILLIPS.

1. A married woman may come into equity, suing by her next friend, to protect her separate property from levy and sale under executions against her husband, if her trustee refuses to interpose a claim at law.
2. A bill filed by a married woman against several execution creditors of her husband, seeking to enjoin the sale of her separate property under their executions, and to reform, if necessary, the deeds under which she claims, is not multifarious.
3. Where slaves are partly purchased and paid for with the money of the husband, and a bill of sale taken to himself as trustee of his wife, he has such an interest in them as may be subjected to the payment of his debts; but his creditors must file a bill for this purpose, to ascertain and separate his interest from that of his wife.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Catherine V. Phillips, suing by her next friend, against her husband, John W. Bridges & Co. and Martin Stetson. Its object was, to enjoin the defendants Bridges & Co. and Stetson from further proceedings under their executions against her husband, which had been levied on certain slaves which the complainant claimed as her separate property, and also to reform, if the court should deem it necessary, the deeds of gift under which she claimed; and it alleges that her trustee refuses to interpose any claim for her at law. The complainant derived title to one of the slaves under a deed of gift from James Anthony, her brother, which purported to convey the slave "to the said Catherine V. Phillips, during her natural life, for her sole and separate use, free from the control or any of the liabilities or debts of her husband; and in the event of her death, the said negro girl and her increase are hereby given and granted to the heirs of her body forever." Another was conveyed, by deed of gift, by Wilder Phillips, who was the father of complainant's husband, "to the said Catherine V. Phillips during her natural life, for her sole and separate use, and in the event of her death, to the heirs of her body forever." The complainant also claimed another slave, by the name of Handy, under a

bill of sale from N. H. Clanton, which recited that the purchase money had been paid by complainant herself, and purported to convey the slave to her husband "in trust for the sole and separate use of the said Catherine V., his wife, free and exempt from all his debts, liabilities and demands"; but the proof tended to show that a part of the purchase money was paid by the husband.

The defendants demurred to the bill, first, for want of equity; secondly, because the complainant had a full and adequate remedy at law; and, thirdly, for multifariousness. The chancellor overruled the demurrer, and granted a perpetual injunction against further proceedings to subject the slaves to the satisfaction of the executions, but without prejudice to defendants' right to file a bill for the purpose of severing the husband's interest in the slave Handy, and subjecting it to the payment of their debts. This decree is now assigned for error.

N. W. COCKE, N. HARRIS and J. E. BELSER, for appellants.

GEO. W. GUNN, *contra.*

LIGON, J.—The bill in this case was filed for two purposes: 1st, to enjoin the sale of the slaves claimed by the complainant as her separate estate from sale under writs of *fi. fa.* issued on judgments against her husband; and, 2nd, to reform, if the chancellor esteemed it necessary, the deeds made by Phillips and Anthony, for two of the slaves levied on, so as to make them vest a separate estate in the complainant, which she alleges was the purpose and intention of the grantors at the time they were made. The defendants, Bridges and Stetson, in the court below, demurred to the bill for want of equity, for multifariousness, and because the complainant had a full and adequate remedy at law.

The bill is filed by a married woman, whose separate estate is levied upon for the debts of a third person, and whose trustee refuses to interpose a claim at law, and thus try her right to the property in the law forum; she has no other remedy left her than the assertion of her right, through her next friend, in a court of equity. In this respect, the case is identical with that of Calhoun v. Cozens, 3 Ala. R. 498, in which the bill was held to be well filed. There is no multifarious-

ness. The levy, a sale under which is sought to be enjoined, is by two plaintiffs at law, it is true; but it is upon the same slaves, and the complainant asserts one title to them all. To require a bill for each creditor, or for each slave, would tend to encourage a multiplicity of suits, which equity abhors.—Larkins *et al.* v. Biddle *et al.*, 21 Ala. 252; Mitford's Plead. 181–2; Story's Eq. Pl. § 530. The refusal of the trustee of a married woman to protect her separate estate at law, gives her the right to go into equity, by her next friend, to seek such protection, no other remedy being open to her.—3 Ala. Rep. 498. The chancellor did not err in overruling the demurrer.

We concur with him, also, in his construction of the deeds under which the complainant holds. Those from Phillips and Anthony vest a separate estate in her by their terms, and expressly exclude the marital rights of her husband. It is true, that the donors limit the property, after her death, to "the heirs of her body;" but this does not enure to the benefit of her husband; the only effect it can have is, to vest an absolute estate in the complainant, who is the first taker.

The deed from Clanton, if considered alone in reference to its terms, would have the same effect. But when taken in connection with the proof, which shows that a part of the purchase money, or the means whence it was derived, belonged to the husband, an interest in the slave, to the extent of the purchase money which belonged to and was paid by him, is established, and is unquestionably liable to the payment of his debts. But, inasmuch as a court of law cannot separate it from that of the wife, it cannot be proceeded against in that forum. The creditor must file his bill in equity for this purpose, when the chancellor will ascertain and separate the interest of the defendant in execution, and by his decree devote it to the payment of the demand of the creditor, whose lien has been fixed by judgment and issue of execution at law. Fellows, Wadsworth & Co. v. Tann, 9 Ala. 999.

There is no error in the record, and the decree is consequently affirmed.

WALKER *vs.* T. & G. FORBES.

1. A guaranty, addressed to a mercantile firm, in these words. "Gentlemen, If you can sell Mr. C. any groceries, I am willing to guaranty the ultimate payment of any bill he may make with you, to the amount of $500," is a collateral undertaking to be ultimately responsible for the demand, if the party to whom the groceries are furnished, after the use of all reasonable and proper means of coercing payment, fails to pay: and notice of acceptance, as also of the principal's default, is necessary to charge the guarantor.
2. Notice of acceptance within a reasonable time must be given to the guarantor, except in cases where the agreement to accept is contemporaneous with the guaranty, or constitutes the consideration and basis of it.
3. Where the guaranty is of a demand to be created in future, and the terms of the contract are left at the option of the guarantee and the principal debtor, the guarantor is entitled to notice of the principal's default; but if the latter is insolvent when the debt falls due, notice is unnecessary, as the guarantor can sustain no injury from the want of it.
4. In assumpsit on a collateral guaranty, in such case, no recovery can be had on the common counts; and a special count, which does not set out the terms of the contract between the guarantee and the principal debtor, is fatally defective on demurrer.
5. The fact of insolvency cannot be proved by hearsay evidence.
6. Sureties, endorsers and guarantors are liable according to the law of the place of their contract.
7. Sections 3014, 3015 and 3016 of the Civil Code of Louisiana apply to ordinary contracts of suretyship, or simple guaranties, but not to cases where the terms of the contract expressly provide or necessarily imply a diligence on the part of the creditor beyond that required by them.
8. A draft drawn by the principal debtor on the guarantor for the amount of the debt, but not accepted by the latter, does not in any way affect the relations of the parties on the original demand, when it does not appear to have been received in payment.
9. The statement of the principal debtor, made during the pendency of the negotiation for the goods, "that he had been unfortunate and was without means," is admissible evidence against the guarantor, in a suit on the guaranty, as tending to show that the credit was given to him.

ERROR to the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT by T. & G. Forbes against Daniel Walker, on a guaranty, for a copy of which see the opinion of the court.—The declaration, in addition to the common money counts, contained four special counts. The first special count alleges,

substantially, that Walker promised to be ultimately responsible for groceries furnished by plaintiffs, under the guaranty, to one Cogburn; that Cogburn has wholly failed to pay; that he is a non-resident of the State of Louisiana, where the guaranty is alleged to have been made; and that he has no property in that State out of which payment can be coerced; "of all which said premises, the said defendant, afterwards, &c., then and there had notice." The second alleges, that Walker guarantied the ultimate payment of the demand; that plaintiffs have diligently sought payment from Cogburn, but he is insolvent, and plaintiffs have been and are unable to collect; of which said premises, &c., defendant then and there had notice. The third sets out the guaranty *in hæc verba*, and avers that plaintiffs diligently sought to collect, but Cogburn was a non-resident of Louisiana, and was and is insolvent; of which premises, &c., defendant had notice. The fourth avers, that the defendant became accountable for the ultimate payment of the debt, and that Cogburn has not paid; of which premises, &c., defendant had notice. A demurrer was interposed to each count, but was overruled.

The plaintiffs offered in evidence the deposition of Richard Deming, who proved the sale and delivery of the goods to Cogburn; "that Messrs. Forbes declined selling any goods to him on his own responsibility, but said they knew Mr. Walker, and that his credit was good, or words to that effect; that Cogburn afterwards came into their store again, with Mr. Walker's letter (the guaranty) in his hand, and delivered it to the plaintiffs; that upon this the goods were sold, and delivered to Cogburn, on Walker's credit; that the propriety of making the sale was discussed by plaintiffs in the presence of witness, and the conclusion was that there was no danger in selling upon Walker's guaranty, as he was known to be solvent; that the sale was made after the delivery of the note, a few minutes after its delivery, on the same day." He further testified as follows: "Cogburn has no property in Louisiana, to my knowledge; I have made many inquiries, but have been unable to find any: *he has usually been represented by his neighbors as insolvent;* payment of the bill has been frequently demanded of him, but no payment has been made." His answer to the second cross interrogatory is as follows: "I do not know anything of Mr. Cogburn's pecuniary means,

except what I learned from him at the time the purchase was made, and his general reputation for solvency among his neighbors; *when he was making the purchase, he stated to plaintiffs, in my presence, that he had been unfortunate and was without means,* and that Mr. Walker proposed to aid him in beginning business." The defendant objected to those portions of the deposition which are italicized; but his objections were overruled, and he excepted.

The plaintiffs also introduced evidence to show that, at the time the guaranty was given and the goods furnished, the defendant was a citizen of Alabama, while Cogburn was a citizen of Arkansas. They also offered in evidence a draft drawn by said Cogburn on the defendant, for the amount of the account for which the suit was brought, with a protest for its non-acceptance; and the notary himself testified, that he had presented the draft to the defendant on the day specified in the protest. Defendant objected to the introduction of this draft and protest; but his objection was overruled, and he excepted. In connection with the draft and protest, plaintiffs also offered in evidence a letter written to them by defendant, "which was read to the jury without exception so far as the letter itself was concerned." The letter is as follows:

"GENTS: Some three days ago I was presented with a draft, drawn in your favor, by J. M. Cogburn, for acceptance; which, as might have been presumed, I refused. I am as much surprised, under the circumstances, at your taking a draft in that case, as I am at his giving it. It is true, you hold my guaranty for the *ultimate* payment of a sum of money not exceeding the amount specified, which makes the debt certain to you, if I am good, and Cogburn should turn out otherwise; but, until that is the case, it imposes no responsibility on me. But, to obviate all difficulty, you will find Mr. Cogburn a trustworthy man, and will get your money in good time."

It was admitted on the part of the defendant, that one of plaintiffs' attorneys had called on him some two or three weeks before this suit was brought, demanded payment, and notified him that, unless paid, suit would be brought. The plaintiffs then offered in evidence sections 3014, 3015 and 3016 of the

Civil Code of Louisiana, for the purpose of showing the law of that State in relation to such contracts as that upon which this suit was brought.

This being substantially all the evidence offered by the plaintiffs, and the defendant offering none, the court charged the jury, that they must find for the plaintiffs, if they believed their evidence. The errors assigned are, first, the overruling of the demurrers to the declaration; second, the several decisions made by the court upon the evidence; and, third, the charge of the court.

GEO. N. STEWART, for the plaintiff in error:

The guaranty was for the *ultimate* payment of the debt.—The first question is, what is the true construction of this obligation? We admit, that in ordinary cases, where a party guarantics the payment of a debt, a demand and notice are sufficient, and the creditor is not bound to sue to insolvency. We contend, however, that in this case, the word "ultimate" means as a last resort—upon a return of "no property found." It is not pretended any suit was ever commenced against Cogburn; nor is, in fact, any demand of him proved; nor is his insolvency even proved, though that would not have been sufficient.

The next objection is, that there was no notice given to Walker of the acceptance of his guaranty, and that he was looked to. This notice is indispensable, as the guaranty is of that class which are prospective, and which do not operate *per se* as absolute obligations.—10 Peters 482; 12 *ib.* 207, 497; 2 Ala. 373; 4 Howard's Miss. 231; 7 Peters 125; Chitty on Con. 436 *a*, note; Story on Con. 727, 748. In all cases, diligence by the creditor must be shown, according to the nature of the obligation. Where suit is necessary, it must be shown to have been prosecuted; where demand merely, that must be shown, and notice to guarantor of non-payment.—19 Johns. 69; 7 Peters 126-7; 3 Wheaton 154, note.

In this case, the terms of the contract made between Forbes and Cogburn are concealed and withheld, both by the pleading and the proof. It seems, credit was given—this is presumed; but how was the debt to be paid? when was it to be paid? and where was it to be paid? These are questions which are

not answered, either by the pleadings or the proof. Were the terms lawful, reasonable, customary, within the terms of the guaranty, or not? We cannot tell. Therefore, when a demand of payment is spoken of, we cannot tell if the demand was a lawful one—that is to say, one that Cogburn was bound by the terms of his contract to comply with. If this is not shown (and it is not), no breach by Cogburn appears, and consequently no liability in Walker. Was it a term of the contract, that Cogburn should, when applied to for payment, give a draft on Walker at four months, payable at Mobile? We are authorized to suppose it was, because we see such a draft, and no agreement to the contrary is proved. If this be so, then the goods were not sold on the faith of the guaranty—that is, the sale is not covered by it, nor within its terms. Its terms were not that goods were to be sold, and Walker drawn on for the payment of them. He was not to be primarily liable, but only ultimately liable. We have the right to assume, we say, that such was the terms of the agreement for the sale of the goods, for we find it so acted on by the parties; and in that case, they cannot look to the guaranty.

But suppose the agreement did not, in the first instance, provide that the goods should be paid for by such draft, but that the debtor Cogburn should have paid for them, when demanded at the time of the date of the draft; and that, instead of paying for them as he should have done, he gave the draft, and that Forbes accepted this draft instead of payment: then, if so, another objection arises, equally fatal to the plaintiffs. The contract was changed; the place of payment was altered; the time of payment changed; time given and extended; and mode of payment changed. This discharges the guarantor; any change discharges him, even when made apparently for his benefit.—Chitty on Cont. 461; 3 Wheat. 155; Story on Cont. § 870, p. 745.

The law of Louisiana is cited by the appellees' counsel; they say, the contract was made in Louisiana. We answer, it was not to be performed in Louisiana; payment was not to be demanded in Louisiana. It was to be demanded, and was applied for, they say, in Arkansas. The record expressly shows, that Cogburn lived in Arkansas; the goods were

shipped in New Orleans, and delivered to him in Arkansas; payment claimed there, and demanded of Walker in Alabama, where he resided. The code of Louisiana, therefore, has nothing to do with it. Besides, the code applies to general contracts; this is a special one, requiring the principal debtor to be prosecuted to judgment and "no property found," by the terms of the contract itself. Again; the law of Louisiana, in the same chapter, expressly provides, that where time is extended, the surety is discharged; the acceptance of the draft at four months discharges Walker under the code of Louisiana.—See Code Lou., 2d art., 3031, 3032. As to what is meant by discussion, see art. 3366.

The court erred in not sustaining the objections to the parts of the deposition excepted to. They were not competent proof of insolvency of Cogburn, to charge Walker on that ground.

The court charged the jury, that if they believed the proof of the plaintiffs, they must find for the plaintiffs. This was wrong, for two reasons: First—all the proof is not sufficient, in point of law, for the reasons above stated; it does not come up to the requisites of the law, and shows Walker to be discharged. Secondly—it misleads the jury, and takes the responsibility of all the assertions of the witnesses, without separating that which is proper from that which is founded on hearsay and suppositions. The witness Deming is cross-examined, and it is shown he testifies to things he knows nothing about. The charge tells the jury, If this is true, you must find, &c.; but that evidence was not sufficient to authorize them to find a demand, and that fact was necessary. So the court misled the jury, and charged them wrongfully. There was really no demand of payment of Cogburn proved. The proof was only available so far as it proved facts alleged; beyond the allegations of the declaration, it was wrong to find any fact on it; but the charge made the whole available, whether within the *allegata* or not. The proof, of course, could have no application to the common count; no recovery could be had on that in such a case.—7 Peters 118.

The counts in the declaration were demurred to severally, and the demurrer to each of the four counts was overruled. If any one count was insufficient, the judgment must be re-

versed; but not one of them is good, and neither one contains all the allegations, properly pleaded, sufficient to support the judgment and make Walker liable. 1. They show goods were sold on credit, but the terms are not set forth. The court cannot judge if the credit was reasonable or proper, nor when the debt was to be paid, nor where, nor by what law it was to be governed, nor where performed. We do not know if the debt be past due or not, nor whether Walker was to be applied to in the first instance for payment, as afterwards assumed. True, they aver that the time of credit had expired, but that is but the conclusion of the pleader; the facts are not shown. 2. These counts contain no sufficient allegation that notice was given to Walker of the acceptance of his guaranty, nor that it was acted on, nor of the terms of credit they had given to Cogburn. 3. No special demand is made of payment from Cogburn, with time and place; nor does it appear it was such a demand as Cogburn was bound to comply with, nor warranted by his agreement with plaintiffs.—2 Stewart 373. 4. No notice is specially averred to Walker, within a reasonable time of the demand, and refusal of Cogburn to pay. 5. There is no averment that any suit was brought against Cogburn for the recovery of the debt. 6. There is no sufficient averment of diligence by the creditor to obtain payment; diligence is averred in some counts, but the facts relied on are not. A mere assertion is made, and conclusions of the pleader merely, but the facts constituting it are not set forth. Each of the counts, when closely examined, will be found deficient in one or more of the above requisites, and neither shows a sufficient liability in Walker.

P. Hamilton, *contra:*

1. The contract, having been made in New Orleans, must be governed by the laws of Louisiana.—1 Ala. 527; 1 How. (U. S.) 169. The law of Louisiana is to be found in the Civil Code, arts. 3014, 3015, 3016.

2. A guarantor is a surety, with such conditions as may be made; in this case, for ultimate payment. Defendant guaranties the collection of the debt (13 Wend. 543), and on this gnaranty, at most, insolvency, or non-residence of the party guarantied, with no property in the State, is sufficient to

charge.—Code Lou. 3015-16; 9 Martin's R. 385. On insolvency, the right to discuss debtor's property ceases (4 Lou. R. 7), and can be obtained only on a plea and tender of expenses (5 Martin's R. 674, 366; 6 *ib.* 562; 9 *ib.* 385); so that the effect of this guaranty is an absolute promise to pay.

3. Cases where terms "ultimate accountability" and "final payment" construed.—6 Greenl. R. 60; 20 Maine R. 28; 4 Greenl. R. 521; 2 Barb. R. 51. It is the business of guarantor to see that principal pays; and no notice is necessary, if guarantee sustain no loss by want of notice.—Authorities *supra;* 22 Ala. 659; and decision by Judge Goldthwaite at this term. Notice and demand, at any time before trial, is sufficient.—12 Pick. 133, 416.

4. A suit against the principal is not necessary, unless required by the terms of the contract.—11 Wend. 100; 17 *ib.* 103.

5. On the facts: The goods and contract of guaranty were contemporaneous. No notice of acceptance of guaranty required.—24 Wend. 82; 2 McLean 21; 1 Story 22.

CHILTON, C. J.—This action is upon a guaranty in the following words: "Messrs. T. & G. Forbes—Gentlemen: If you can sell Mr. J. M. Cogburn any groceries, I am willing to guaranty the ultimate payment of any bill he may make with you, to the amount of five hundred dollars. Yours respectfully, (signed) D. Walker, (dated) New Orleans, April 10th, 1850." The ascertainment of the legal effect of this instrument, will enable us better to determine the questions raised upon the judgment overruling the demurrers to the four special counts in the plaintiffs' declaration.

It is certainly not an absolute undertaking to be primarily responsible for the demand; but to see it ultimately paid—that is, after the plaintiffs had used all means in their power, which were reasonable and proper, to coerce payment out of Cogburn, who was understood to be the party primarily liable.—If they have failed to do this, or to show that the use of such means would have been unavailing, by reason of his insolvency or from some other cause, they cannot recover. Any other construction would, we think, make the guaranty read as though the word "ultimate" had been omitted, and would do violence to the intention of the parties. It is, in effect, a

guaranty of the goodness of the demand. The principle upon which the cases of Lewis v. Hoblitgill's Adm'r, 6 Gill & John. 259, Johnson v. Chapman, 3 Penn. 18, Foster v. Barney, 3 Verm. 60, Rudy v. Wolf, 16 Serg. & Rawle 69, and Nesbit v. Bradford, 6 Ala. 746, were decided, fully covers this case; see, also, Story on Contracts, § 871 a, and cases cited by him, n. 1.

Again; Walker is willing to guaranty the ultimate payment if the plaintiffs will sell groceries to Cogburn. Here was a proposal to become ultimately bound, requiring an acceptance on the part of the plaintiffs before it could be said to be a consummated contract. It is well settled, that in such case the guarantor is entitled to notice of the acceptance of his order in order to bind him; for he has a right to know whether the persons to whom the letter is addressed intend to look to him ultimately for payment, and of the extent of his liability and the terms of the contract.—Edmundson v. Drake, 5 Peters 624; Douglass v. Reynolds, 7 *ib.* 113; Lee v. Dick, 10 *ib.* 482; 12 *ib.* 497; Wildes v. Savage, 1 Story's Rep. 32; Lawson v. Towns, 2 Ala. 373; Story on Con., § 873. This information is necessary to enable the guarantor to provide for his safety and indemnity as against his principal. Besides, he has the right, where the contract of guaranty does not determine the character and extent of his responsibility, but these are left at the option of the creditor, to know in what manner that option has been exercised, so as to enable him to fulfil his engagement.—See 2 Amer. Leading Cases, p. 81, and Henning's Case, Cro. Jac. 432.

It is supposed by some of the courts, that this notice must be given immediately upon the acceptance of the guaranty; but we think the better opinion, and that more consonant with reason, is that the notice of acceptance should be given in a reasonable time. But this doctrine is inapplicable to cases where the agreement to accept is cotemporaneous with the guaranty, or when it constitutes the consideration and basis thereof. So, if in the case before us the plaintiffs refused to credit Cogburn, and he thereupon agreed to give them, as security for his bill to be made with them, the guaranty of Walker, who, in consideration of their promise to accept it and sell the goods upon the faith of it, executed and

delivered it, or caused it to be delivered to the plaintiffs, the parties all being in the same city, and the information as to the amount of groceries sold and the terms of credit being accessible to all, we do not think any further notice of the acceptance and action upon the guaranty by the plaintiffs was necessary to charge the guarantor. It was his business to have ascertained the amount and extent of his liability for himself, which he could have done upon inquiry. The whole arrangement having been concluded at the same time, notice of acceptance is implied by the assent of plaintiffs to the guarantor's offer.—Howe v. Nickels, 22 Maine 175; Wildes v. Savage, 1 Story 22.

But it is insisted, that notice of the default of the principal must be given to the guarantor before he can be held answerable. The rule, in such cases as this, requires that reasonable notice should be given. The doctrine asserted in Donley v. Camp, 22 Ala. 659, does not apply to cases like the present. That was the guaranty of a specific, existing demand; but here no demand existed at the time: it was to be created in future, and the terms of the contract and the amount to be paid within the limit specified in the guaranty, were left at the option of the guarantee and principal debtor.

If, however, notice has not been given, it does not necessarily follow that Walker is discharged. If Cogburn was insolvent when the debt fell due, and he has sustained no injury from want of notice, his liability remains unaffected by the failure to notify him of the default. If he has sustained an injury for want of such notice, he is released to the extent of that injury. This seems to be the rule deducible from the current of the authorities both English and American.—See them collated in the notes of Messrs. Hare & Wallace, in 2 American Leading Cases, pp. 54 to 98, and a perspicuous and able commentary upon them by those gentlemen.

We have thus far treated this guaranty as though it were to be governed by the laws of this State in which the remedy is sought. It is suggested, however, that it was made in New Orleans, to be executed and consummated in Louisiana, and must be governed by the laws in force in that State, which entered into and formed a part of the contract. We will presently discuss it in this aspect.

Upon a slight inspection of the four special counts, it is very clear that each of them is insufficient, in this, that they fail to set out the terms of the contract between the plaintiffs and Cogburn. Credit was given to him for a specified sum: but we are not advised by the counts as to how, or when the debt was to be paid, so that we cannot determine whether the terms agreed upon were lawful or within the scope of the guaranty. Failing to aver the terms of the contract, the allegation that Cogburn has made default, is but a conclusion of the pleader, and not an averment of a fact upon notice of which the liability of the guarantor is to attach. It is an elementary rule, that the pleader must aver every fact of which the court will not judicially take notice, which is necessary to entitle him to recover, and that it is not sufficient to allege mere conclusions.—1 Chitty's Pl. 214. The declaration is, therefore, bad, and the court erred in overruling the demurrer to the special counts. We are aware, that the form here pursued accords substantially with that given by Mr. Chitty, but the English doctrine is different from our own, as respects notice in such cases. His form, adapted to the English rule, which does not require such notice, is substantially defective with us, in cases where, as we have shown, the guarantor is entitled to notice of the acceptance of the guaranty, and the amount and term of credit extended to the third party under it. As to the common counts, we may lay them out of view, as it is not pretended that upon this collateral agreement any recovery could be had under them.—Douglass *et al.* v. Reynolds, 7 Peters 113.

The court below also committed an error, in permitting hearsay evidence to establish the insolvency of Cogburn. After the fact of insolvency is established, such proof is sometimes received to show the notoriety of it, as conducing to bring knowledge of it to particular persons who may be affected thereby; but it has never been allowed as evidence to prove the fact itself. The farthest the courts have gone, is to allow proof by reputation of facts from which insolvency may be inferred, but not reputation of insolvency, since that is a legal conclusion from facts.—Lawson v. Orear, 7 Ala. 784-788.

We come next briefly to consider the case under the facts as disclosed by the bill of exceptions.

The guaranty was given in the city of New Orleans, and

the plaintiffs were merchants residing there. The guarantor resided in this State, and Cogburn, the principal debtor, in Arkansas. The goods were shipped on the vessel of which the guarantor was captain, and delivered to Cogburn in the State of his residence. It thus appears that the contract of guaranty was consummated in the State of Louisiana, and there is nothing apparent from the face of it, or by the oral proof, to show that the payment was to be made, or the execution of it was to be had, elsewhere. Under these circumstances it is clear, we think, that the general rule must apply, that sureties, endorsers and guarantors are liable according to the law of the place of their contract.—Story's Conflict of Laws, p. 223, § 266; Story on Bills, §§ 397, 399, 177 and notes; Chitty on Bills, 661–881; Lowry's Adm'r v. The Western Bank of Georgia, 7 Ala. 120; King v. Harman's Heirs, 6 La. 607; Dunn v. Adams, Parminter & Co., 1 *ib.* 527; Bell v. Brewer, 1 How. U. S. 169.

Upon examining the provisions of the Civil Code of Louisiana, to which we are referred by the record, we are not, however, prepared to hold that they apply to a contract like the present. Section 3014 defines the obligation of the surety towards the creditor to be, to satisfy the debt if the debtor does not, and prescribes that the property of the debtor is to be previously discussed or seized, unless the surety should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor. By section 3015, the creditor is not bound to discuss the principal debtor's property, unless required to do so by the surety on the institution of proceedings against the latter; and the next section (3016) provides, that if the surety requires discussion, he is bound to point out property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect; this property must not be out of the State, nor in litigation, nor out of the possession of the debtor under a mortgage.

These sections, we think, apply to ordinary contracts of suretyship, or simple guaranties; but not to cases where the terms of the contract expressly provide, or necessarily imply, a diligence on the part of the creditor beyond that required by them. The contract of the parties, if lawful, must be carried out; and we have seen that the meaning of this engage-

ment is, that the creditor will use all lawful and proper means to collect the demand of the debtor where he resides, or show that the use of such means would have been fruitless. As, therefore, in order to fix the liability of the guarantor, the contract contemplated the exercise of diligence, and the pursuit of legal remedies, if need be, without the State of Louisiana, the doctrine of discussion could not have been applied, we apprehend, even had the action been brought in Louisiana. The case, we think, would not, and does not, fall within the influence of these provisions.

As to the draft taken by the plaintiffs of Cogburn on Walker, which he refused to accept, being for this bill of goods, and remaining unpaid, we do not perceive how it can affect the relation of the parties in respect of the original demand. It does not appear to have been received in payment, and cannot therefore have the effect of discharging the guarantor.

The statement made by Cogburn, as deposed to by the witness Deming, viz., "that he had been unfortunate and was without means," was properly received in evidence. It was made pending the negotiation for the goods, and tended to show a material fact, namely, that the credit was given to Walker and not to Cogburn.

Neither do we think there was any error in allowing the draft and protest to be given in evidence, in connection with the letter of Walker, which relates to them, and the evidence of the notary. They served to show that Walker was advised that his letter of guaranty had been acted upon, and of the amount of the credit given to Cogburn, as also, that he *then* considered himself *ultimately* bound for the demand due from Cogburn.

The charge, however, was not warranted by the proof, as it failed to show Cogburn's insolvency; and as there was no proof of any legal proceedings against the debtor, nor any agreement waiving such diligence, it must be shown that such diligence would have been fruitless, or a recovery cannot be had.

For these errors, the judgment of the City Court is reversed, and the cause must be remanded.

CHEEK *vs.* WALDRUM AND WIFE.

1. A sale under a mortgage, made after the law day of the deed, and in pursuance of its terms, vests in the purchaser all the title conveyed by the mortgage, divested of the equity of redemption.
2. When the wife is seized in fee simple of lands at the time of her marriage, her husband, by virtue of the marriage, takes at least an estate for her life, which is a legal freehold subject to levy and sale under execution at law against him.
3. When a mortgagor conveys mortgaged lands by an absolute conveyance, the estate of the purchaser is liable to be divested by a sale under the mortgage; and if the lands are subsequently sold under the mortgage, his widow is not entitled to dower in them.
4. The law attaches interest as an incident to a debt from the moment it is due, unless there is some agreement between the parties to the contrary; the fact that the vendor acted in bad faith, and attempted to repudiate his contract altogether, does not relieve the vendee from the payment of interest, on a bill filed to enforce a vendor's lien.

APPEAL from the Chancery Court of Lowndes.
Heard before the Hon. J. W. LESESNE.

THE original bill in this case was filed by Randal Cheek to enforce his vendor's lien for the unpaid purchase money of certain lots in the town of Hayneville, which he purchased at sheriff's sale under execution at law against Charles Waldrum, and afterwards sold to Susannah Waldrum, the wife of said Charles. The sale to said Susannah was made on or about the first of January, 1848, for the sum of $595, of which $180 were paid when the vendor executed a conveyance of the premises to one Gray, as trustee for Mrs. Waldrum; but it does not appear that any further payment of the purchase money has ever been made. The bill alleges, that the whole of the purchase money was due on the first day of January, 1848, and was to bear interest from that time until paid; that these were the terms of the contract of sale, but, if complainant is mistaken in this respect, then he alleges that the purchase money was to be paid so soon as that sum could be made by the defendants from the business of tavern-keeping in said house, for which purpose they have constantly used it since said sale; that the defendants have constantly used and

occupied the premises since the said sale, and have realized more than $1000 from their said business since that time; that said Susannah has frequently promised to pay the balance of the purchase money, but has hitherto failed to do so; that no note was taken for its payment; that said Susannah, by an act of the Legislature, approved February 22, 1848, was made a "free dealer, and capable of contracting as a *feme sole;*" that the defendants are insolvent, and own no property except said premises.

The defendants all answer the bill. Gray admits that he wrote the deed from complainant to himself as trustee of Mrs. Waldrum, and that it was fully executed by the former, but disclaims all interest in the suit; says he has done nothing under the trust; and proposes in his answer to resign his office as trustee.

Waldrum and wife file an original and an amended answer, an answer to an amended bill, and a cross bill; but there is no amended bill in the record. In the first of these, the contract for the sale of the premises is admitted to be, as to the sum to be paid, what the bill charges it to be, but it is denied that it was to bear interest as charged, or that it was due on the 1st day of January, 1848, or at any particular day, but alleges that it was to be paid as the amount was made by them from keeping tavern on the premises. They set up the payment of $180 at or near the time of the sale, and aver that the balance, with interest upon it, would have been paid, but that the complainant repudiated the contract, and brought ejectment for the premises, denying that he had ever conveyed them by deed. They further aver, that after the deed was made and delivered to Gray, it was handed to Mrs. Waldrum, who on the same day placed it in the hands of complainant for safe keeping. They admit their uninterrupted possession of the premises, and say they have never realized from tavern keeping more than enough to pay the expense of keeping up the house. The insolvency of Susannah Waldrum is denied. They also deny that complainant purchased the premises at sheriff sale, at the request of Mrs. Waldrum or her husband. This is the substance of their answers to the original and amended bills.

In an amended answer afterwards filed by them, it is set

up by way of defence, that, previous to her marriage with Waldrum, Mrs. Waldrum had been the wife of one Farley, who owned and possessed the premises in dispute, by purchase from one Lanier, in the year 1840; that he took from said Lanier a deed in fee simple for the premises, and continued to possess and use them until his death; that when Farley purchased of Lanier, there was an existing unsatisfied mortgage on the premises, made by Lanier to one James T. Neil, to secure the payment of the sum of $800; that the premises were sold to satisfy the mortgage after the death of Farley, and at this mortgage sale, John N. Smith became the purchaser; that in 1841 Mrs. Waldrum paid to Smith the amount of the purchase money, and received from him a quit-claim deed for the premises; that in 1847 the sheriff of Lowndes county sold the premises under writs of execution issued on judgments at law against the defendant Charles Waldrum, and at that sale complainant became the purchaser; that complainant by his purchase took no title except such as was in Charles Waldrum, and this, the answer insists, was none.

After this answer was filed, the defendants Waldrum and wife set up by a cross bill a claim to dower in the premises for Mrs. Waldrum as the widow of Farley, alleging that it was the homestead of Farley at the time of his death, and that no dower has ever been allotted to her; that she received the deed from Cheek, and both of them contracted with him, in ignorance of her rights, "*if they ever contracted with him at all in reference to the premises.*" Mrs. Waldrum avers, that Charles Waldrum, her present husband, had no interest in the premises which could be levied on and sold under execution at law, at the time Cheek purchased; that Cheek has no title, nor did he ever have, but that the title is in herself; that Cheek refuses to rescind the contract made between them. The cross bill prays that the contract with Cheek be annulled and held for naught, and for general relief.

Gray is no party to the cross bill, either as complainant or defendant. Cheek answers, setting out the matters contained in the original bill, and denying the principal matters contained in the cross bill. He avers that he bought the premises at the express request of Waldrum and wife; that Mrs. Waldrum accepted through her trustee a deed in fee for the

premises, with the knowledge and consent of her husband, and, as he believes, with a knowledge of all her rights.

A deed from one Turner to Lanier for the premises was exhibited, and its execution admitted; also, a deed in fee from Lanier to Farley, and a quit-claim deed from Smith and wife to Mrs. Waldrum, then the widow of her first husband, Samuel Farley. The deed of mortgage from Lanier to Neil, which is admitted in the answer, is not in the record. The proof shows that Waldrum and wife received from monthly boarders alone upwards of $1000 in the year 1850 and part of the year 1851.

The chancellor dismissed the bill, holding "that the complainant took no title by his purchase at sheriff's sale, and therefore had none to convey; and that the defendants were not estopped from setting up their prior possession, the defect of title in Cheek, and the outstanding title in another. This decree is now assigned for error.

GEO. W. STONE, for the appellant:

1. Cheek had the right to file his bill to sell the house and lot to pay the purchase money, without first suing at law.—White v. Stone, 10 Ala. 441; Forman v. Hardwick, 10 *ib.* 316; Houston v. Stanton, 11 *ib.* 414.

2. The house and lot were clearly subject to levy and sale in payment of Waldrum's debts. She owned the property at the time of her intermarriage with Waldrum, and Cheek purchased at least an estate as long as the marriage continued.—Neil v. Johnson, 11 Ala. 615.

3. The cross bill, setting up as it does that the property was Mrs. Waldrum's—not Waldrum's—at the time Cheek purchased, offers no bar to our right to recover.—See Neil v. Johnson, *supra.*

4. The pretence that Mrs. Waldrum has a dower interest in the property, not yet allotted, is alike groundless. The property had been sold under mortgage, having a prior and paramount lien over the title of Mr. Farley, her first husband. Smith bought the entire title, and left nothing in Farley or his estate, of which the widow could be endowed. When Mrs. Farley, now Mrs. Waldrum, bought from Smith, she acquired the entire title; but she held as purchaser, not as dowress.

5. But if Mrs. Waldrum was entitled to dower, or quarantine, before dower was allotted to her, she acquired, by purchase, the entire estate. Her dower, then, became merged in the other estate, and the partial or qualified life estate was lost. The fee simple was in her, and dower could not be allotted out of her own estate. There could be no parties to such proceeding; nothing could be accomplished by it.

6. Cheek certainly acquired some interest by his purchase. Mrs. Waldrum purchased that interest, and has the benefit of it. The property is subject to its payment.

7. Even if Mr. Cheek acquired nothing by his purchase, Mrs. Waldrum purchased from him, and thus admitted he had a right to the property. She has never been disturbed. In such case, she becomes *quasi* tenant to Cheek, and is estopped from disputing his title.—Jackson v. Ayers, 14 Johns. 223; 4 Paige 94; Whiteside v. Jackson, 1 Wend. 418; Jackson v. Walker, 7 Cow. 637; Jackson v. Smith, *ib.* 717; Jackson v. Miller, *ib.* 747; Gillespie v. Battle, 15 Ala.

8. If Cheek had no title, Mrs. Waldrum knew as well, or better than he did, the condition of the title, and all the facts connected therewith. No fraud, or improper act, is imputed to Cheek; it was simply a mistake of law. In such case there is no relief.—Haden v. Ware, 15 Ala. 149.

9. The record in this case shows almost conclusively, that Cheek purchased at the request of Waldrum and wife, to be re-sold to them, for their accommodation. In such case, they are estopped from gainsaying Cheek's right to sell.—See authorities *supra*, to point numbered 7.

WATTS, JUDGE & JACKSON, *contra:*

I.—1. Charles Waldrum had no such title in the premises as could be sold under execution, at the time of the sale of the premises under execution against him. The premises were conveyed by Turner to Lanier, and by Lanier to Farley, the former husband of Mrs. Waldrum; and Farley died in the possession, having the legal title, the premises being his last residence. Mrs. Waldrum, then, as the widow of Farley, was entitled to dower in the premises, and the premises having been the last residence of Farley, is entitled to the possession of the premises until her dower is allotted and set

apart to her; and that has never been done. And this claim of hers to dower is not the subject of levy and sale under execution.—Johnson & Co. v. Spaight, 14 Ala. 27; Doe *ex dem.* Cook and Hardy v. Webb, 18 *ib.* 810, and authorities therein cited.

2. But it is said that the premises, after Farley's death, were sold under a mortgage made by him in his life-time; that John N. Smith became the purchaser; and that Smith conveyed to Mrs. Farley, then Mrs. Waldrum; and that Waldrum, by virtue of his marriage with Mrs. Farley, acquired a property in the premises, subject to levy and sale. To this we answer—1st. There is no sufficient proof in the record, that any conveyance was ever made to Smith by the mortgagee of Farley, nor that Smith ever actually conveyed to Mrs. Waldrum. It is averred and admitted in the record, that Smith purchased at the mortgage sale, but there is no averment or proof that a conveyance was made; but if it was averred and admitted, as it is that a conveyance was made by Smith to Mrs. Waldrum, still this would not be sufficient, for parol admission is competent evidence only of those facts which may be proved by parol.—See 1 Greenl. Ev. §§ 203, 96. Conveyances of land must be proved by the conveyances themselves. 2d. If these conveyances were sufficiently proved, the result would be still the same, because Mrs. Waldrum's purchase from Smith did not extinguish her right to dower, and to the possession of the premises until her dower was allotted to her. Her dower was a life-estate only in one-third, and by the purchase he acquired a fee simple in the remainder of the property. This placed the property in such a condition, that it could not be sold under execution. The remedy of the judgment creditor was in equity only; he should have filed a bill to separate the dower from the other interest, and then to subject the interest of Waldrum, acquired in the whole by virtue of his marriage, to the payment of his debt.

3. But it is further contended, that if Waldrum had no interest in the property, subject to levy and sale, Mrs. Waldrum is estopped from setting it up, inasmuch as it is said Cheek bought at her instance and request. If this were so, we deny that it would amount to an estoppel. But the fact is not so,

nor is it proved. Waldrum and wife both positively deny this allegation; this denial is responsive, and there is no evidence in the record to overturn it. See also Cheek's affidavit, made in suit at law, before the bill was filed by him, in which he sets up no such agreement, but says, after he purchased he for some time rented to Waldrum; which negatives the idea that he bought at the instance of Mrs. Waldrum, and on a previous agreement to re-sell to her.

II.—But concede that Waldrum had an interest in the property subject to levy and sale under execution, and still the decree of the chancellor was correct; because, under the contract of sale by Cheek to Mrs. Waldrum, she was not to pay Cheek until she made the money by tavern-keeping. The evidence does not sufficiently show that the money was thus made before the bill was filed.

LIGON, J.—In order to ascertain the rights and remedies of the parties to this record, it is necessary to ascertain the true state of the title to the premises at the time they were levied on by the sheriff of Lowndes county, at whose sale Cheek became the purchaser.

Turner is the source of title, so far as the record discloses, and there is no question between the parties as to his right to convey. The proof shows that he, by deed, conveyed the fee in the lots to Lanier. Lanier conveys it, first, by deed of mortgage, with the power of sale, to Neil, his creditor, and then, while this mortgage was outstanding and unsatisfied, he conveys the same estate, by deed of bargain and sale, to Farley. The latter then took the estate subject to the prior lien created by the mortgage, which lien took precedence of his title and was paramount to it. After the law day of the mortgage, the estate in the mortgagee became absolute, subject only to Lanier's equitable right to redeem, before sale under the mortgage. It does not appear that there was any redemption, either by Lanier, or Farley, the purchaser under him. The mortgagee sold under his mortgage, and Smith became the purchaser at that sale.

At this point, the title again becomes entire in one person; for it is well settled, that a sale under mortgage, after the law day has passed, made in pursuance to the terms of the deed,

vests the purchaser with all the title which the mortgagor conveyed by the mortgage, and he takes it divested of the equity of redemption.

Smith, then, took the fee in the premises at his purchase under the sale made by the mortgagee, wholly unincumbered of the right of Lanier, or Farley as the purchaser from him, to redeem under the mortgage. This being the case, the deed from Smith to Mrs. Farley (now Mrs. Waldrum), conveyed the fee to her. It is true, this deed is in the nature of a quit-claim deed to a certain extent, but it may be better styled a deed of bargain and sale, without covenants of warranty, except as against the grantor and those claiming under him. It conveys, by its express terms, all right, title, interest and claim which the grantor has in and to the premises, to Mrs. Farley, the grantee, which, as we have seen, was the fee in the land.

With this title, thus vested in her, she intermarries with Waldrum, who went into possession of the premises, and who, by virtue of his marriage, took, at the least, an estate for her life, which is a legal freehold estate, and is clearly the subject of levy and sale under execution issued on a judgment at law against him.—Carleton & Co. v. Banks, 7 Ala. 32; Neil v. Johnson, 11 Ala. 615. The estate which Farley took under the deed from Lanier, although apparently an absolute fee, was subject to be divested, by a sale of the lands under the prior mortgage to Neil. When this sale was made, and another became the purchaser, that other was invested with the absolute fee, and all title was divested out of Farley, or those claiming through him. Mrs. Waldrum, his widow, could not charge the title in his hands with any claim of dower, since it had its origin in a conveyance which existed before her husband had any claim whatever, which hovered over the title in his hands while he lived, and divested it out of those claiming under him, by the sale made after his death. Fry v. Merchants' Ins. Co., 15 Ala. 810.

This view is conclusive against the relief sought by the cross bill, which should have been dismissed by the chancellor, and his failure to do so is error.

On the case made by the original bill, answers and proof, the contract of sale appears to be, that Mrs. Waldrum was to

pay to Cheek the sum which the latter paid to the sheriff on his purchase at the sale made by that officer under execution, amounting to five hundred and ninety-five dollars. This is stated in the bill, and expressly admitted in the answers.—There is some discrepancy between the bill and answers, as to the time when the purchase money was to be paid, and an apparent difference on the question of interest. On the latter subject, however, the difference between the bill and the answers of Waldrum and wife, is more in words than in fact.—The bill charges that it was agreed between the parties that the defendant should pay interest on the purchase money from the day of sale, while the answers assert that no agreement was made upon the subject. The law attaches interest as an incident to a debt from the moment it is due, unless there is some agreement between the parties to the contrary. It is not pretended, in this case, that Cheek agreed to postpone the payment of his debt without interest; on the contrary, the principal defendants admit, in their answers, that they intended to pay interest while the principal debt remained unpaid, and say that they would have done so if the complainant had not acted in bad faith with them, and attempted to repudiate the contract altogether. This does not relieve them from its payment.

As to the time when the purchase money was to be paid, there is no difference between the alternative charge in the bill, and the statements of the answer of Waldrum and wife. They both agree that it was to be paid as soon as the money could be made by the defendants from keeping tavern on the premises. This time has long since passed, according to the bill; but this is denied in the answers, which assert that nothing has been made by them. The proof shows, however, that the defendants must have received from monthly boarders alone, in the years 1850 and '51, more than a thousand dollars. How much was received from other sources, during these and other years, does not appear; but we deem it fair to presume that a sum greatly more than was necessary to pay the complainant's demand has been received by the defendants, Waldrum and wife, since the sale to them set out in the bill.

Under these circumstances, it was error to dismiss the com-

plainant's bill. The right decree would have been, to foreclose Mrs. Waldrum's equity of redemption in the premises, and unless the sum due the complainant for his purchase money were paid at an early day, to be fixed by the chancellor, to direct a sale of the premises for its payment. A reference to the master should have been made, in order to ascertain the balance of the purchase money due and unpaid. The trustee, Gray, should have been perpetually enjoined from setting up against the purchaser at the sale under the decree, the title vested in him by the deed from the complainant.

As, however, this was not done by the court below, the cross bill must be dismissed at the costs of Waldrum and wife; and the decree of the court below on the original bill reversed, and the cause remanded, at the costs also of Waldrum and wife.

SNODGRASS *vs.* BRANCH BANK AT DECATUR.

1. The possession of slaves by a fraudulent vendee gives him no title under the statute of limitations, as against a creditor of the vendor, if the latter could not, by reasonable diligence, have discovered the fraud within six years before the levy of his execution.
2. A witness may testify to the existence of notes or bills of exchange, although they are not produced, nor their absence accounted for.
3. So, also, he may testify to the fact that a debtor made a written proposition of compromise, without producing the writing, or accounting for its absence.
4. On a trial of the right of property in slaves, the claimant derived title under a bill of sale from the defendant in execution, which the plaintiff attacked for fraud; and it was shown that the slaves had remained in the claimant's possession for about four years from the date of the bill of sale: *Held*, that the plaintiff might prove that the defendant in execution was decreed a bankrupt at the expiration of that time, and that the slaves were found in his possession a few months afterwards.
5. The record of a judgment rendered against the defendant in execution after his sale to the claimant, is not admissible evidence, as against the claimant, to prove an indebtedness prior to its rendition.

ERROR to the Circuit Court of Jackson.

Tried before the Hon. GEO. D. SHORTRIDGE.

TRIAL OF THE RIGHT OF PROPERTY in certain slaves, which had been levied on under execution in favor of the Branch Bank at Decatur against Benjamin Snodgrass, and claimed by William Snodgrass, the plaintiff in error, who derived title under an absolute bill of sale from said Benjamin. The plaintiff's judgment, on which the execution issued, was rendered in 1839; and the claimant's bill of sale, which purported to be for valuable consideration. was dated May 31, 1838. The execution was levied on the slaves in controversy on the 9th of October, 1846.

To prove an indebtedness from said Benjamin Snodgrass to said Branch Bank, and that said indebtedness existed prior to said 31st day of May, 1838, the time when said sale was made by said Benjamin to the claimant, the plaintiff offered to read the recitals in a transcript of the record of two judgments, rendered against said Benjamin, in favor of said Branch Bank, in 1839; to which, as evidence of an indebtedness prior to the date of the judgments, the claimant objected; but the court overruled his objection. and allowed the recitals in said transcript to be read to the jury, as evidence of the time when the debts on which the judgments were rendered were contracted; and to this ruling of the court the claimant excepted.

The plaintiff introduced a witness, who testified, that he was a director in said Branch Bank at Decatur in 1837 and 1838, and was well acquainted with the handwriting of said Benjamin Snodgrass; that he saw in said Bank, in those years, several notes and bills of exchange having the signature of said Benjamin Snodgrass, or signed by his then partner in business, with whose handwriting witness was also acquainted, in the firm name of Harris & Snodgrass. Upon cross-examination, said witness, who was introduced by plaintiff to prove an indebtedness on the part of said Benjamin Snodgrass to said Branch Bank prior to the date of said bill of sale, testified, that he knew of said indebtedness only from having seen said notes and bills of exchange, as above stated, and from entries in the books of said Bank. Neither said

notes or bills of exchange, nor said books containing said entries, nor sworn copies thereof, were produced, nor was their absence accounted for. The claimant objected to the admission of so much of the testimony of said witness as related to said indebtedness; but the court overruled his objection, and permitted the evidence to go to the jury; and the claimant excepted.

In order to show a motive for the execution of said bill of sale, plaintiff asked a witness, if said Benjamin Snodgrass had not, prior to said 31st day of May, 1838, made a proposition to compromise his indebtedness to said Branch Bank, and if said proposition had not been rejected prior to said 31st of May, 1838. The claimant objected to this question, but his objection was overruled. The witness answered, that said Benjamin did make such a proposition in writing, and that it was rejected, prior to said 31st May, 1838. Said written proposition of compromise was not produced, nor was its absence accounted for. The claimant objected to the admission of this evidence; but his objection was overruled, and he excepted.

The plaintiff also offered to read to the jury a transcript of a decree in bankruptcy, rendered by the U. S. District Court at Huntsville on the 29th day of November, 1843, discharging said Benjamin Snodgrass as a bankrupt. This transcript was offered as evidence to show the fact and date of such discharge, and that only about two months elapsed after the date of said discharge before said slaves returned to the possession of said Benjamin. The claimant objected to the admission of said transcript; but his objection was overruled, and he accepted.

There was evidence tending to show, that the claimant purchased said slaves from said Benjamin Snodgrass on the 31st of May, 1838; that they were then in the possession of one Thomas Snodgrass under a contract of hiring, and so remained in his posession until the 1st of January, 1839, when they passed into the possession of the claimant, and continued in his possession until the 22nd day of January, 1844; that they then passed into the possession of said Benjamin, under a contract of hiring between him and said claimant, and continued in his possession until October, 1846, when plaintiff's

execution was levied on them. There was evidence, also, tending to show that claimant, from the time of his purchase, in 1838, until the levy of plaintiff's execution, claimed said slaves to be his own property.

Upon this evidence, the claimant asked the court to instruct the jury, that if they believed from the evidence that claimant purchased said slaves from said Benjamin Snodgrass on the 31st of May, 1838, and claimed them as his own from that time until the levy of plaintiff's execution, and that said slaves were in his peaceable possession from the 1st of January, 1839, until the 22nd of January, 1844, and then passed from him, under a contract of hiring, into the possession of said Benjamin Snodgrass, and remained in his possession, under said contract, until the levy of plaintiff's execution, in October, 1846, and that plaintiff's judgment was rendered on the 22nd of February, 1839; then they must find for the claimant, although they might believe that claimant's said purchase was made to hinder and delay the creditors of said Benjamin Snodgrass. The court refused to give this charge, and the claimant excepted.

These several rulings of the court are now assigned for error.

Saml. F. Rice, with whom were Brickell & Cabaniss, for the plaintiff in error:

1. A record is evidence of the facts recited in it, only as between parties and privies.—3 Porter 403; 7 *ib.* 466; 9 *ib.* 412; 9 Ala. 973; 17 *ib.* 681.

2. When the contents of a writing are inquired after, it must be produced, or its absence must be accounted for.—Smith v. Armstead, 7 Ala. 702. When a witness states that written evidence of a fact exists, parol evidence is inadmissible.—12 Ala. 263. A witness cannot testify as to facts of which he knows nothing further than that he found them recorded in the books of a Bank.—8 Ala. 79. An admission, made during a proposition of compromise, is not admissible evidence against the maker of it.—14 Ala. 465; 8 *ib.* 432. The proposition of compromise made by the defendant in execution, was an act or declaration with which the claimant had no connection, and was therefore inadmissible against him.—10 Ala. 355.

3. The decree in bankruptcy was inadmissible, because (1st) it was rendered long after the sale to the claimant; and because (2nd) it did not tend to raise any presumption against the fairness of that sale.—7 Ala. 382; 10 *ib.* 379; 16 *ib.* 364; 18 *ib.* 585; 17 *ib.* 503.

4. The charge requested, as to the effect of the statute of limitations, should have been given: it asserted a correct proposition of law. It has long been settled, in this State, that the statute of limitations embraced every claim to property, however imposing, with the single exception of claims founded on a *direct trust of exclusive equitable cognizance.*—Mason v. Maury, 8 Porter 211; Humphries v. Terrell, 1 Ala. 650; Johnson v. Johnson, 5 *ib.* 90; Tarleton v. Goldthwaite, 23 *ib.* If creditors have any claim to slaves, the possession of which has been parted with by their debtor, under an absolute bill of sale executed with intent to defraud them, that claim may be asserted *at law*, as soon as they obtain judgment and can issue execution thereon, by causing their execution to be levied on the slaves in the possession of the fraudulent vendee. Such a claim, then, is not exclusively cognizable in equity; nor is it founded on a direct trust, but, at most, is based on the idea of an implied trust, and is not exempt from the influence of the statute of limitations. That statute expressly provides, that certain *persons* shall be saved from its influence—i. e. minors, *femes covert*, &c.; but there is no saving as to a *creditor*. It expressly provides, also, that certain *subjects* shall be excepted from its influence—i. e. accounts between merchant and merchant, &c.; but there is no exception as to *frauds*, nor as to possession parted with under fraudulent bills of sale.

If, then, such a possession never can be protected by the statute of limitations, why is it so? The only reasons assigned are, the provisions of the second section of the statute of frauds; for, if there was no statute of frauds, it is certain that such a possession might create a title in the possessor under the statute of limitations. To give this effect to the statute of frauds, the courts must sanction one or more of the following propositions: 1st, that the statute of frauds, *per se*, creates a new exception not contained in the statute of limitations; 2nd, that in the enactment of the two statutes, or of

one of them, the Legislature intended, by a studied silence as to them, to exclude such possessions from the operation of the statute of limitations; 3rd, that the statute of frauds, whenever it speaks, is a statute of frauds, operating as such upon every subject mentioned in it, and whenever it ceases to speak, it becomes also a supplemental statute of limitations, engrafting on the original, by the magic of its silence, a saving of creditors and an exception of all such possessions; 4th, that in the construction of these statutes, the maxim "*expressio unius exclusio alterius*," and the rule which requires such a construction to be placed on each, if possible, as will allow some effect to every word and clause of each, must both be abandoned. Each of these propositions is indefensible.—Each one of these statutes is as much a part of the law, as the other; each has a distinct object, and a distinct sphere of operation; each can operate in full, without the slightest interference with the complete operation of the other; they are harmonious parts of one system.

The statute of frauds operates upon "every gift, grant, or conveyance" of real or personal property, and upon "every bond, suit, judgment, or execution," had, made, or contrived of fraud, collusion, or guile, with intent to delay, hinder, or defraud creditors; it also operates (not upon all possessions, but) upon certain possessions therein specified, viz., possessions held for three years under a loan, reservation, or limitation of use or property. The plain object of the statute was, to put out of the way of creditors every such gift, grant, conveyance, bond, suit, judgment, or execution, and to declare the effect of such possessions of three years, and to leave every other kind of possession to the operation of such other law, including the statute of limitations, as might be applicable to them. The statute is not silent on the subject of possessions; it mentions and makes provision as to certain kinds of possession, which would not confer title under the statute of limitations. But it is entirely silent as to possessions of six or sixteen years, and as to the effect of possession in creating title under the statute of limitations. There must be some significance in this discriminating silence.—When the subject of possessions was in the mind of the Legislature, as shown by the provisions of the statute of frauds,

why were its provisions confined to "possessions of three years under loans," &c., and to the declaration that "every conveyance," &c., to defraud creditors, should be void as to them? Why was no provision superadded, that possession, held or acquired under such fraudulent conveyance, should be inoperative to create title under the statute of limitations? The simple answer is, that the statute of frauds was not intended to enlarge or diminish the sphere of the statute of limitations, nor the subjects or persons embraced by it at that time.

The statute of limitations operates upon wrongful possessions—unlawful possessions—possessions which the courts of the country would not protect, but would change upon the application of the person having the superior right within the time prescribed by it. Its object is, to quiet all such wrongful possessions, when they have continued for the prescribed time, to divest all outstanding title, and vest it in the possessor. If the possession is rightful when commenced, the statute does not operate upon it so long as it continues rightful. But if it afterwards becomes wrongful, no matter how, and continues wrongful for the prescribed length of time, the statute creates a title in the possessor. Whether acquired by a trespass, or by a fraudulent conveyance, or any void grant, such possession, if wrongful, is alike within the operation of the statute; for that statute begins to operate as soon as the possession is wrongful, unless the case falls within one of its express exceptions.—Comins v. Comins, 21 Conn. 413, which is opposed to the case cited by the defendant from 4 Day's R. 284; Sumner v. Stephens, 6 Metcalf's R. 337; Parker v. Gregory, 29 E. C. L. R. 14; Barker v. Salmon, 2 Metcalf's R. 32.—An entry and possession, under a claim of title, by virtue of a void grant, is not less adverse, than if the possession were taken and held without any color of title whatever.—Angell on Limitations, p. 410; 8 Cowen 609; 16 Ala. 595; 2 Smith's L. Cas. 492; 21 Conn. 413; 6 Metc. 337. The simple inquiry is, whether the possession of slaves, acquired under a fraudulent conveyance, is rightful or wrongful as against a judgment creditor of the grantor. If such possession is rightful, the law will not allow the creditor to disturb it; but if wrongful, he may disturb it by levy at any time

within six years after it commenced. The conveyance, if fraudulent, is void as to creditors, and must be put out of their way; and when the conveyance is thus put aside, the possession was wrongful from its commencement.

The statute does run in cases of fraud, and forms a positive bar which a court of law cannot disregard.—3 Murph. (N. C.) 115; *ib.* 544; 3 Ired. 481. To hold that it will not run, would repeal the statute.—9 Verm. 110; 10 Ohio 469; 2 Munf. 511; 11 Humph. 313. Plaintiff's ignorance of his rights is no answer to a plea of the statute.—20 Johns. 33; 5 Wend. 30; 17 *ib.* 202. No fraud, or knowledge on part of the defendant that his claim is fraudulent, will excuse the plaintiff from bringing his action in time.—24 Wend. 587; 1 Humph. 335; 4 *ib.* 312; 7 Yerger 222; 2 Hill (S. C.) 299. The true meaning of the statute, as to personalty, is, that the party shall have six years within which it shall be open to him to proceed to assert his title.—1 Sch. & Lef. 413; 3 Johns. 524; 13 Missouri R. 159.

John A. Elmore and C. C. Clay, Jr., *contra:*

1. The transcripts were admissible as evidence of the indebtedness of defendant in execution prior to the sale of the negroes: 1st, as an admission by the defendant in execution "at a period of time when it was not his interest to make it."—Goodgame v. Cole, 12 Ala. 77; 2nd, as tending, in connection with the testimony of the bank director, to prove the prior indebtedness of the defendant in execution, from the presumption that the judgments were on the instruments seen by the director. Although there may have been error in admitting it, without the announcement of the expected connection, yet, when this subsequent evidence was introduced, naturally connecting itself with the previous evidence, the error was cured, as it is error without injury. On the admission of this evidence, see authorities *post* on 2nd point.

2. There is no error shown by the record in the admission of these transcripts. Their contents are not set out, and error will not be presumed, but must be shown affirmitively. Long v. Rogers, 19 Ala. 322; Lawson v. Orear, 7 *ib.* 784; 1 *ib.* 517; Stone v. Stone, *ib.* 582; Duffee v. Pennington, *ib.* 506; Dozier v. Joyce, 8 Port. 303; 15 Ala. 18.

3. The notes and bills, testified to by the director, need not have been produced, or their absence accounted for, by positive evidence; because, 1st, the evidence was not as to their contents, but the fact of their existence (P. & M. Bank v. Borland, 5 Ala. 531 (543-4); P. & M. Bank v. Willis & Co., 5 *ib.* 770, (783-4); Andrews, &c., v. Jones, 10 *ib.* 460 (473); Graham v. Lockhart, 8 *ib.* 9 (25); Smith v. Armstead, 7 *ib.* 698 (702); Sally's Adm'rs v. Capps, 1 *ib.* 121); 2nd, they were collateral instruments, and their contents may be proved without accounting for them (see cases *supra*); 3rd, their absence was sufficiently accounted for. Ten years had elapsed—presumption of loss, or that they had been mislaid, or out of the power of the Bank to produce, would arise from this lapse of time. It is a question addressed to the discretion of the court, whether they are withheld from a sinister purpose. Sally's Adm'rs v. Capps, 1 Ala. 121; Mordecai v. Beal, 8 Porter 529; Jones v. Scott, 2 Ala. 58. The witness knew the handwriting, and his evidence on this fact was as good as if the notes and bills had been before him while testifying.—His evidence as to the entries in the books of the Bank, was brought out in cross examination by the claimant, and was his testimony. If one part of this witness' evidence was good, it is not impaired by a part which is illegal, unless the objection was confined to that portion which was illegal; but the objection was to the whole of the testimony.—Hrabrouski v. Herbert, 4 Ala. 265; Hatchett v. Gibson, 13 *ib.* 587; Melton v. Troutman, 15 *ib.* 535.

4. The proposition to compromise was admissible: 1st, as evidence of indebtedness at the time to the Bank; 2d, as evidence of his embarrassments previous to, and in connection with, the sale to his brother; and, in connection with the refusal of the Bank, evidence of a motive on his part to put his property out of the way. This was not a proposition to settle a controversy by compromise, but to discharge an admitted debt by the payment of less than the whole, or in some other manner. The objection, however, as to its being a proposition of compromise, cannot be made by a third party; it is a personal privilege of the party making the offer.

5. The objection to the evidence of the proposition for a compromise, was not that the writing was not produced, or

accounted for; and if the writing itself would have been evidence if produced and proved, this exception must fail. The presumption was, however, that the writing was lost, mislaid, or returned to the defendant in execution. It was also a collateral paper.—See authorities on third point, *supra*.

6. The evidence of the bankruptcy, in connection with the immediately subsequent possession of the negroes by the defendant in execution, was competent. There was no presumption that they had been acquired after the bankrupt's discharge by his industry or business. His previous possession and subsequent were facts, in connection with others, for the jury, to determine whether it was honest and fair, or otherwise.—Hargrove v. Cloud, 8 Ala. 173; Petty v. Walker, 10 *ib.* 379; Powell v. Knox, 16 *ib.* 364.

7. When the claimant derives title from the defendant in execution, if that title is fraudulent, he cannot interpose the statute of limitations against the creditors of the defendant. Powell v. Wragg & Stewart, 13 Ala. 161; Beach v. Catlin, 4 Day 284; Ballantine on Limitations, 374. In such a case the claim is not *bona fide*, which is necessary to make the possession adverse.—Herbert v. Hanrick, 16 Ala. 595; Brown v. Lipscomb, 9 Porter 472; Abercrombie v. Baldwin, 15 Ala. 363; Kelty v. Fitzhugh, 4 Rand. 600; Hinton v. Nelms, 13 Ala. 222. Nor can it be confirmed by matter subsequent.—Roberts on Frauds, 495-6, 521-2, 595; Duncan v. McCulloch, 4 S. & R. 483; Kimball v. Hutchinson, 3 Conn. 450. And his possession is that of the defendant in execution.—McCaskle v. Amarine, 12 Ala. 24; McConnell v. Brown, 5 Monroe 484.

8. In trials of this character, where claimant derives title under the defendant, the only question is, the *bona fides* of the transaction.—Yarborough v. Moss, 9 Ala. 382.

9. The charge requested was properly refused: because, 1st, the question of adverse possession is one of fact for the jury, and this by the charge was taken from them (McMasters v. Bell, 2 Penn. 180; Herbert v. Hanrick, 16 Ala. 594; Grafton v. Grafton, 8 S. & M. 77); 2nd, to constitute adverse possession, the assertion of the claimant's right must be open and notorious, or known to the plaintiff, and this fact was omitted in the charge requested (Hinton v. Nelms, 13 Ala.

222; Abercrombie v. Baldwin, 15 *ib.* 363; Herbert v. Hanrick, 16 *ib.* 581); 3rd, if the charge had been given, the jury under it might have found for the claimant, although his possession was not *bona fide*, or his claim openly asserted or known to the plaintiff. The claimant cannot deny the title under which he acquired possession, and the title is cumbered with the fraud.

The answer to the argument of Mr. Rice is, that the possession is acquired under a secret trust in favor of the grantor, and the grantee is but the bailee of the grantor; and the law presumes the continued possession to be under the same trust or bailment, unless the contrary be shown. Also, the titles being void against the creditors of the defendant in execution, and the effect the same as if there was no deed—the possession without title or deed is referred still to the title of the defendant in execution, on the ground of the secret trust in his favor.

GOLDTHWAITE, J.—The main question in this case is as to the effect of the statute of limitations upon the possession of a vendee acquired and held under a conveyance to defraud creditors. In courts of equity, it is received as the settled doctrine, that fraud, if operating to conceal the facts upon which the rights of a party to maintain his suit depend, does affect the bar which would otherwise be created by the statute of limitations; and in all cases where that court acts in obedience or analogy to the statute, if the complainant uses reasonable diligence to discover the fraud, and files his bill within the time prescribed by the statute after such discovery, it is sufficient.—Booth v. Lord Warrengton, 4 Bro. Parl. Cas. 163; Western v. Cartright, Sel. Cas. in Chan. 34; South Sea Co. v. Wymondsell, 3 Pr. Wms. 143; Hovenden v. Lord Annesley, 5 Sch. & Lef. 634; Michaud v. Girard, 4 How. 503; Troup v. Smith, 20 John. 33; Farnam v. Brooks, 9 Pick. 212; Sherwood v. Sutton, 5 Mason 143; Frankfort Bank v. Markley, 1 Dan. 373. But whether fraud, thus operating, will have the same effect at law, is a question upon which there is some conflict of authority. In Bree v. Holbreck, Doug. 630, on a demurrer to a replication, the object of which was to take the case out of the statute upon an alle-

gation of fraud, Lord Mansfield said, "There may be cases which fraud will take out of the statue of limitations"; and the plaintiff was permitted to amend his replication, so as to charge fraud in the defendant; the facts alleged, in the opinion of the court, not amounting to fraud. In Clarke v. Hougham, 3 D. & Ry. 320, it seems to have been conceded, that had there been a special charge of fraud, it would have furnished an answer to a plea of the statute. See, also, the opinion of Abbot, J., in Granger v. George, 5 B. & C. 149; Brown v. Howard, 4 Moore 503; Bolton *Ex parte*, 1 M. & A. 60. These cases are conclusive, we think, to show that in England, when the facts are concealed by fraud, the statute only runs, in courts of law, from the discovery of the fraud. In the United States, the question has frequently been considered; and in Beach v. Catlin, 4 Day 284, upon the identical question which is presented in the present case, it was held, that no length of possession under a fraudulent deed would give the vendee title, as against the creditors of the vendor. In Powell v. Wragg & Stewart, Collier, C. J., holds the same opinion; but we do not regard that case as an authoritative exposition of the law, for the reason, that two judges only were sitting, and Dargan, J., rests his opinion on different grounds. In Massachusetts, Maine, Pennsylvania and Indiana, a doctrine in conformity with that of Lord Mansfield is asserted (Massachusetts Turnpike Co. v. Field, 3 Mass. 201; Horner v. Fish, 1 Pick.; Wells v. Fish, 3 Pick. 75; Jones v. Caraway, 4 Yeates 109; McDowell v. Young, 12 S. & R. 128; Rush v. Barr, 1 Watts 110; Perrock v. Freeman, *ib.* 491; Harrisburg Bank v. Foster, 8 Watts 12; Raymond v. Symonson, 4 Black. 85); and McLean so holds in Mitchell v. Thompson, 1 McLean Cir. Co. R. 96; and Judge Story, in Sherwood v. Sutton, *supra*, in a well considered opinion, in which he reviews the leading authorities on both sides, arrives at the same conclusion, resting his opinion mainly on the ground that fraud forms an implied exception to the statute. On the other hand, the courts of New York, Virginia, South Carolina, North Carolina and Tennessee, hold the opposite doctrine.—Troup v. Smith, 20 John. 33; Callis v. Waddy, 2 Munf. 511; Miles v. Barry, 1 Hill's S. C. 296; Hamilton v. Smith, 3 Mur. 115; York v. Bright,

4 Hump. 312. The weight of authority is, we think, clearly with the position, that there are cases in which fraud will, in courts of law, furnish an answer to the statute; but we do not rest it upon authority alone: we are not willing to go to the length of the Connecticut decision, and hold that no length of possession, however long, under a fraudulent conveyance, will bar the creditors of the grantor. A possession under a fraudulent deed may be void, but it is no more so than one acquired by a trespass, or any other unlawful act; and against possessions of the latter character, it is clear, the statute runs. We agree, that the statute is one of repose, and would apply it to every case of adverse possession, except where the defendant, *by fraud*, has prevented the plaintiff from obtaining a knowledge of the facts upon which his action depends; and in such a case, the party should, under the influence of the statute, be required to bring his suit within the period prescribed after the discovery; but the defendant should not be allowed to claim any benefit by a fraud upon the statute. The act, it is to be observed, was passed for the protection of the defendant. By his fraudulent conduct he prevents the plaintiff from complying with its terms—from bringing his suit within the time—and then seeks to take advantage of an omission which his own fraud has caused. A construction which would produce this result, is at variance with the established rules of law, which never allows an advantage to be gained in this way; and, if countenanced by the courts, must necessarily enure to the encouragement of fraud. Such, we think, could not have been the intention of the Legislature, and such is not the rule which a just and enlightened equity, professing to follow the law, holds. Upon principle, as well as authority, our conclusion is, that if the creditor could not, with reasonable diligence, have discovered that the conveyance was fraudulent within six years before the levy of his execution, the possession of the fraudulent vendee for more than that time would give him no title against the creditor. The court, therefore, did not err in the refusal to give the first charge requested.

The proof by the witness who testified, that he was acquainted with the hand-writing of Benjamin Snodgrass, and that he had seen notes and bills of exchange, signed by him

and his partner, in the possession of the Bank, prior to the date of the sale, although the notes and bills were not produced, nor their absence accounted for, was competent. The fact of the existence of such notes and bills, he could as well prove, if he knew it, without their production, as if they were produced. There was no attempt to prove their contents. The case falls, on this point, within the decisions in 5 Ala. 543; 8 *ib.* 9; 21 *ib.*, Dixon v. Barclay. See the cases collated on this question in Cowen & Hill's Notes to Phil. on Ev. pp. 1207, *et seq.*

Proof that Benjamin Snodgrass, previously to the sale in May, 1838, had made a proposition in writing to the Decatur Bank to compromise his indebtedness, which had been rejected, without the production of the paper making the offer, was competent, as tending to show the existence of an indebtedness at that time by the party making the offer. The same rule will govern as in the point last considered. It was proving as a fact the existence of such a paper, not the particular contents. We do not understand, from the terms of the bill of exceptions, that this "proposition to compromise his indebtedness" was any offer to buy his peace against a disputed claim, and confidential in its character, but simply to settle the debt by paying less than the whole amount admitted to be due.

The court admitted testimony on the part of the plaintiff below, that the slaves in controversy had gone back into the possession of Benjamin Snodgrass a short time after his discharge as a bankrupt, and, to show the time of such discharge, allowed a transcript of the decree in bankruptcy to be given in evidence against the objection of the claimant.—As a general rule, great latitude is allowed in the range of the evidence, when the question of fraud is involved. It is indispensable to truth and justice that it shou'd be so; for it is hardly ever possible to prove fraud, except by a comprehensive and comparative view of the actions of the party to whom the fraud is imputed, and his relative position a reasonable time before, at, and a reasonable time after, the time at which the act of fraud is alleged to have been committed. No more precise general rule can be laid down in such cases. Here, the alleged act of fraud is the sale in May, 1838. After

that the slaves go into the possession of the vendee, and remain four years. The vendor, in the course of two years or so, goes into bankruptcy, and obtains his discharge in November, 1843 ; and in a few months after this event, the slaves are found again in his possession. We do not hesitate to say, that it was competent to prove to the jury, in a case like this, as circumstances proper to be taken into the whole account, that the vendor was decreed a bankrupt in 1843, and that a short time after his discharge the slaves went back into his possession. The transcript of the decree was the proper form of evidence of the fact of his bankruptcy and discharge.

The recitals of the record in suits between the Decatur Branch Bank and Benjamin Snodgrass, in which judgments were rendered against him in 1839, were admitted by the court, against the specific objection of claimant, to prove that said Benjamin was indebted to the said Bank prior to the date of the judgments in said suits. This was error. A record of a judgment between other parties is always admissible to prove the mere fact of the existence of such judgment, when that fact is material to the issue. This comprehends only the judgment of the court, and such parts of the record as are necessary to show when and by what court it was rendered. All other parts—the declarations, pleas, orders of continuance, or the recitals which precede the judgment, when the court is of special and limited jurisdiction, or where a court of general jurisdiction renders judgment by default in a statutory proceeding—must be considered, as to all other persons than the parties to the judgment and their privies, "*res inter alios acta*," and therefore not admissible as evidence against them.

The defendant in error insists, that Benjamin Snodgrass may have demurred to the Bank notice or declaration, prior to the date of the bill of sale to claimant, or given a power of attorney to confess judgment before then, which was duly proven, and that either of these would be a judicial admission of indebtedness before the sale, provable by the record. As against Benjamin Snodgrass, doubtless, it would, in favor of any one ; but to say that it would be a judicial admission of Benjamin Snodgrass that will bind William L. Snodgrass, is to say that one man may make an admission which will

affect the interests of another, and fix the proof of it at the same moment, without that other ever having an opportunity to be heard, which is against all reason and principle.—Crutchfield v. Hudson, 23 Ala.; 1 Green. Ev. §§ 527 *et seq.*

For the error above noted, the judgment must be reversed, and the cause remanded.

McGEHEE ET AL. *vs.* GEWIN.

1. When a sheriff takes a bond from his deputy, conditioned for the faithful discharge of his duties, he is not required to notify the sureties of the deputy's default before bringing suit on the bond; and therefore, in a suit on their bond, evidence of the deputy's ability to pay at the time of his leaving the State, and afterwards, is not admissible evidence for the sureties.
2. If the sheriff pays to the plaintiff the amount of an execution then in force in his deputy's hands, and the deputy afterwards collects it from the defendant in execution, his sureties are liable on their bond if he fails to account for it, as no one but the defendant in execution can take advantage of the payment by the sheriff.
3. The deputy having "proposed to pay" the money collected by him to his principal, the latter "told him that he would see the persons it was going to, and that he could pay it to them:" *Held*, that this did not amount to a legal tender of the money to the principal, but was a direction to the deputy to pay it to the persons entitled to receive it; and on his failure to do this, in consequence of which the principal was compelled to pay it, the sureties of the deputy were liable on their bond.
4. The surety cannot discharge himself from liability on his bond by giving notice to the sheriff that he will no longer be bound for the deputy.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. GEO. D. SHORTRIDGE.

THIS was an action of debt on a penal bond, which Gewin, the plaintiff, who was sheriff of Lawrence county, had taken from Silas M. McGehee, his deputy, conditioned for the faithful discharge of his duties as such deputy. The breach assigned is, that said McGehee had collected $336 30 on a *fi. fa.* placed in his hands as deputy sheriff, on the 27th of August, 1841, which *fi. fa.* was issued on a judgment of the County Court of Lawrence in favor of Josephus Walker against Felix A.

M. Sherrod; that he had wholly failed to pay over said money, either to the plaintiff in this suit, or to said Walker; and that the plaintiff had afterwards paid to said Walker the said sum of money, together with the interest which had accrued thereon. A demurrer was interposed to the declaration, but the record does not show what disposition was made of it. The defendants pleaded *nil debet*, with leave to give any special matter in evidence.

On the trial, two bills of exceptions were taken by the defendants. From the first it appears, that "after the plaintiff had closed his testimony, by reading the bond, judgment and *fi. fa.* thereon, mentioned in the declaration, the defendants offered Wiley Galloway as a witness, who testified, that Felton, one of the defendants, called on him to hand a written notice to Gewin that he (Felton) was unwilling to continue a surety of said McGehee on his bond as deputy sheriff, and that he gave up said McGehee in said notice; that this was done at the March term of the Circuit Court of Lawrence, in the year 1841 or 1842; that witness did not remember and could not say whether it was in 1841 or 1842. The defendants then offered the deposition of said McGehee (he not being a party to the action), to show that he and said Gewin had had a settlement of their accounts in the fall of 1844, when said Gewin accepted an order drawn by said McGehee, in favor of Rosenthal, for about $20, to be paid out of certain fees for costs which said McGehee alleged were due him from the Branch Bank at Decatur; that about this time said McGehee was about leaving this State, for the purpose of settling in Missouri, in which State, and in Kentucky, said McGehee had since resided, except on occasional visits to this State. It was not shown that said Gewin ever made known said alleged default of McGehee's to said sureties on his bond, before the bringing of this suit. To the introduction of this testimony there was no objection. Defendants then offered to prove, that said McGehee, at the time he left this State in 1844, was solvent, and in good circumstances, and carried off considerable property with him, but since that time he has become wholly insolvent, and so remains. The plaintiff objected to the introduction of this evidence, and the court sustained the objection;" and thereupon defendants excepted.

The second bill of exceptions sets out the same facts, but with more particularity. It appears that the execution on which the money was collected by McGehee, was issued on a forfeited forthcoming bond, on the 9th of August, 1841, and was returned by McGehee "satisfied in full, *August* 27, 1841"; while the plaintiff paid the amount of the judgment to Walker, the plaintiff in the execution, on the 19*th of August*, 1841. McGehee's deposition is set out in this bill of exceptions. He testifies, that he acted as deputy for Gewin "until about the commencement of the warm weather in the spring of 1841," when Gewin informed him by letter that some of his sureties had given him up, and that he must give a new bond, if he continued to act as deputy; that he attempted to give a new bond, but after twelve months' effort did not succeed; that he never heard of any suits being contemplated against him, until in the winter of 1847-8, after his removal to Kentucky; that after he considered himself dismissed by Gewin, the latter requested him to act as special deputy in cases of emergency; that after he collected the money on said execution, he paid a part of it to Lewis Garrett, on the order of James W. McClung, whom he then thought authorized to receive it; that he offered to pay it to Gewin, who told him to pay it to the persons to whom it was going; that he removed from this State in the fall of 1843, having previously had a settlement with Gewin of all their affairs; that he never had any written authority from Gewin.

The defendants requested the following charges:

1. That, if the jury believed from the evidence that Gewin had paid the amount of Walker's judgment to Walker before the collection of the money by said deputy, such payment by Gewin to Walker was a satisfaction of Walker's judgment, and a satisfaction of the *fi. fa.* issued on said judgment then in said deputy's hands; and that after a satisfaction of Walker's judgment by Gewin, he was not authorized as sheriff, either by himself or deputy, to keep said judgment open for his own benefit, for the purpose of reimbursing himself the amount which he had paid Walker: and if, after such satisfaction of Walker's judgment, Gewin went on, and by his deputy, under color of authority of the *fi. fa.*, collected the amount of the said judgment for his own benefit, and the

deputy afterwards failed to pay the money thus collected to Gewin, the failure was not such an act as would constitute a breach of the condition of the bond, and render the sureties liable in this action.

2. That if Gewin paid Walker's judgment to him, this was a satisfaction of the judgment, and also a satisfaction of the *fi. fa.* in the hands of the deputy; and if the deputy, after such payment of the judgment, went on, and collected the amount of it from the defendants therein, under color of the *fi. fa.* then in his hands, for Gewin's benefit, and afterwards failed to pay the amount thus collected to Gewin, such failure is not such a breach of the deputy's bond, as would render the sureties liable thereon in this action.

3. That if Walker's judgment was paid to him by Gewin, as shown in Walker's receipt of August 19, 1841, this payment terminated his official connection with the judgment, so far as the collection of it was concerned; and when his official connection with the judgment was thus terminated, his deputy's official connection with the collection of it was terminated also; then the sureties of the deputy would not be responsible for the deputy's act, in failing to pay over the money for Gewin's benefit, after such termination of his official connection with the collection of said judgment, whether collected under color of the *fi. fa.* then in his hands, or otherwise.

4. That, if the jury believe from the testimony, that, after the collection of Walker's judgment by the deputy, and the return of the *fi. fa.* under color of which it was collected, the deputy then tendered the money so collected to Gewin, and offered to pay the same over to him, it was Gewin's duty to the sureties of his deputy to have accepted and received the money thus tendered; and if he failed and declined to do so, and permitted the money to remain in the deputy's hands, without communicating the same to the sureties, and obtaining their assent thereto, and afterwards the deputy failed to pay over the money, thus left in his hands, on demand of Gewin, then the sureties would not be liable on their bond for such failure.

5. That after the payment of the judgment by Gewin to Walker, (if the jury believe this was proven,) then the *fi. fa.* in the deputy's hands expired, as a legal authority to collect

the amount of the judgment from the defendants therein, for the benefit of Gewin, and then the sureties of the deputy would not be liable for the collection thus made under a process that had expired.

The court refused all these charges, and charged the jury as follows: "That if they should find from the facts that said McGehee had never been discharged, dismissed, or released as deputy sheriff of said Gewin, under the bond aforesaid, and had never been surrendered by his sureties, and had proceeded under said executions, as such deputy, to collect the money on said *fi. fa.*, and had collected the same on the 27th August, 1841, as such deputy sheriff, then, and in that event, although the previous payment of August 19, 1841, made by Gewin as sheriff to Walker, would be a satisfaction of said judgment, and a destruction of its vitality, as against the defendants therein; yet, unless the defendant availed himself of said payment by Gewin, the said judgment, as between the parties to this suit, and with reference to this action, would be so far binding and effectual, as to render the defendants liable to Gewin on said bond, for the money so collected by the deputy, although it was collected by him after the said payment by Gewin to Walker."

The defendants excepted to the charge given, and to the refusal to charge as requested; and they now assign for error the several rulings of the court, above stated, to which they excepted.

THOS. M. PETERS, with whom was R. O. PICKETT, for the appellants:

1. Gewin's acts were well calculated to induce the sureties of his deputy to believe that no default had been committed, or that he did not intend to hold them responsible for it until after the deputy became insolvent. If this was so, then the question of insolvency was material, and proof of it should not have been excluded. Evidence was offered to show that Felton, one of the sureties, complained to Gewin of the deputy, and demanded his (deputy's) dismissal in 1841, before the default complained of; and that the deputy was notified of this complaint and required to give a new bond. After this, the default was committed. Gewin made no complaint, con-

tinued the deputy in the discharge of his duties, and long afterwards had a settlement with him of his official accounts; fell in debt to him, and gave an order to Rosenthal for about twenty dollars, and permitted the deputy to leave the State solvent and full-handed; and, although he knew of the default, it was concealed by him from the sureties until the deputy had left the State and become insolvent. Had he acted otherwise, and notified the sureties of the default in proper time, they could have had the deputy sued whilst he was solvent and able to pay. But the sheriff's conduct towards the deputy was such as to aid the deputy to get out of the reach of his sureties, and carry off his property, to their injury. This is not allowed; for it is said to be a general rule founded on "a just and equitable principle," that "if any thing be done between the creditor and principal debtor, which creates injury to the surety, it will go in discharge of his responsibility." Shively v. U. States, 5 Watts 172; Peel v. Tatlock, 1 Bos. & P. 422; Commonwealth v. Miller, 8 S. & R. 452; People v. Jansen, 7 Johns. 332; Weaver v. Shryock, 6 S. & R. 262; Baker v. Riggs, 8 Pick. 122; Taylor v. Bank of Kentucky, 2 J. J. Mar. 564; Hoffman v. Hurlburt, 13 Verm. 377; Bank of Manchester v. Bartlett, 13 *ib.* 315; Ramsey v. Westmoreland Bank, 2 Penn. 203; Wright v. Knepper, 1 *ib.* 361; Row v. Pulver, 1 Cow. 246; State v. Reynolds, 3 Miss. 95; Strader v. Houghton, 9 Port. 334; Wood v. Gray, 5 Ala. 43–47; Bank v. Broughton, 15 *ib.* 127; 3 Stew. 160; 3 Ala. 409; 15 *ib.* 19; 20 *ib.* 512; 18 *ib.* 97, 645.

2. This is more particularly so as to Felton; but as the sureties are not only liable to the obligee in the bond, but to one another, if the obligee by his conduct discharged Felton, he discharged all the rest.—Townes v. Riddle, 2 Ala. 694; Robert v. Adams, 6 Porter 361; Wright v. Stockton, 5 Leigh 153; Couch v. Terry, 12 Ala. 225; Sherrod v. Rhodes, 5 *ib.* 683; 2 Poth. on Oblig., 59, *et seq.*; Young v. Clark, 2 Ala. 264.

3. There is error in the fourth exception. If the deputy tendered the money after its collection to his principal, it should have been received by him; and if after such tender the deputy became insolvent, the loss should not fall on the sureties, because it happened from the sheriff's own act.—

Hampshire Manuf. B'k v. Billings, 17 Pick. 87 ; Wayne v. Kirby, 2 Bailey 551, and cases *supra*.

4. "It is certainly true, that the sheriff has no power to pay the money due on judgment, and keep the execution open for his own benefit"; nor can the sheriff, by himself or deputy, execute process, or collect money on execution, when he is a party, or has an interest. Both these rules of law must be violated, if the sureties of the deputy are held liable, in this action. In such a case as this, the defendant may adopt the payment made by the sheriff, and then he becomes liable in *assumpsit* to the sheriff to repay him the money thus paid.—If this re-payment is made to the sheriff's deputy, and the deputy fails to pay it over to his principal, the transaction is wholly a private affair, and not official, and the sureties are not liable. That the money was collected under pretence of authority of the execution, makes no difference; it was so collected for the sheriff, and on his private account, after the judgment was extinguished by payment. As against the sureties, the sheriff should be held to a strict and legal performance of his duties, and if he is injured by an illegal and irregular discharge of them, he has no right to complain. To say that he has "no power" to do a thing, is to say that it is illegal and the law forbids it. He cannot, then, confer on himself rights against the sureties by an illegal act.—Boren v. McGhee, 6 Port. 445 ; 7 Ala. 469; Fournier v. Curry, 4 *ib.* 321 ; Crutchfield v. Haynes, 14 *ib.* 49 ; Roundtree v. Weaver, 8 *ib.* 314, 316 ; Clay's Digest, 159, § 2 ; Mooney v. Parker, 18 Ala. 708; Collins v. Blanton, 2 Wills. 341; 6 Term Rep. 16.

5. The payment of the judgment extinguished it, so far at least as a right to collect money on it is concerned; and when the judgment is extinguished, the execution issued on it for collection of the money due thereon is extinguished also. The execution, before the payment of the money due on the judgment, is an authority to the sheriff to collect the money; but after the money is paid this authority ceases; and though it may have a certain kind of vitality for some equitable purposes, its vitality is gone as an authority to collect money, for the sheriff or indeed any one else. To give it such vitality, would make it an instrument of extortion,

either in the hands of the plaintiff or sheriff, against weak defendants, who might be so situated as to be unable to give the bond required to suspend it. To say that a defendant so treated has his remedy by action for damages, is poor protection after his property is plundered and lost,—is but to aggravate his injuries if the sheriff or plaintiff happen to be reckless and insolvent men. When the judgment was paid, the sheriff's official connection with it expired, and so did his deputy's; and for acts done after that, the sureties are not liable. This case is unlike Mooney v. Parker (18 Ala. 708). Nelms v. Williams, 18 *ib.* 650; Dixon v. Caskey, *ib.* 97; Jackson v. Anderson, 4 Wend. 474; Foward v. Marsh, 18 Ala. 645; Lewis v. Palmer, 6 Wend, 368; Mooney v. Parker, 18 Ala. 708; Jackson v. Caldwell, 1 Cowen 602; 1 Cowen 717; Cuthbert v. Huggins, 21 Ala. 349; Swan v. Sanddlemire, 8 Wend. 687; Andress v. Broughton, 21 Ala. 200; Poor v. Deavor, 1 Ired. 391; Martin v. Gondy, 1 Hill's S. C. 417; Planters' Bank v. Spencer, 3 S. & M. 305.

6. After the payment of the judgment by Gewin, the liability of the defendant to the plaintiff was gone, and the defendant became liable to the sheriff in *assumpsit*, to repay him the amount of the judgment; if his deputy collected the debt thus due him by *assumpsit* of defendant, and failed to pay it over, the sureties are not liable, because they never bound themselves for such acts of the deputy.—Mooney v. Parker, 18 Ala. 708, 712.

L. P. Walker and Sam'l F. Rice, *contra:*

1. In this State, the common-law rule is, that a deputy sheriff is the agent or bailiff of the sheriff. A bond executed by a deputy sheriff to the sheriff, for the performance of "all the duties which are or may be required of him (the deputy) by law as deputy sheriff," is not for the security of the public, but a mere contract to indemnify the sheriff.—Pond v. Vanderveer, 17 Ala. 426.

2. Such bond extends to all acts of the deputy so long as he continued to be such deputy (Hughes v. Smith *et al.*, 5 Johns. 169); and he continues to be such deputy, until the sheriff goes out of office, or actually removes the deputy.—The U. States v. Vanzandt, 11 Wheat. 189.

3. Although the sheriff may have the power to remove the deputy at his discretion, yet a surety on such bond has no lawful right, either to require his removal, or to put an end to his obligation, by merely giving a written notice to the sheriff that the surety was unwilling to continue a surety for the deputy on said bond, and that he gave up said deputy. Such a right in a surety in such a bond, has no foundation either in the statute or common law ; especially where, as in this case, the notice was given before any breach of duty or of the bond by the deputy.—Crane v. Newell, 2 Pick. 612 ; Andrus v. Bealls, 9 Cowen 693 ; Bernard v. Darling, 11 Wend. 27 ; The U. S. v. Vanzandt, 11 Wheat. 184.

4. If it be admitted, that a surety in a bond for the payment of money or some other article, has the legal right to request the creditor to sue the principal thereon, and that if the principal is at that time solvent and afterwards become insolvent, the failure of the creditor to sue on such bond upon such request, discharges the surety ; yet this concession will not benefit the plaintiffs in error : 1st. Because this rule of law applies only to notes or bonds for the payment of money or other thing, and not to bonds for the performance of certain official acts or duties, nor to any mere bond of indemnity, like the bond here sued on. 2nd. Because this rule of law will not apply even to a note or bond for the payment of money, until it is shown that the surety has done more than the surety did do in this case. In other words, a surety on a note or bond for the payment of money, has no right to give such a notice as was given by the surety in this case, to-wit, a mere notice that he is unwilling to continue to be a surety and that he gives up his principal. Such a notice is not effectual for any purpose, and proves nothing, and cannot authorize the surety to prove that his principal was solvent when such notice was given, and had subsequently become insolvent.—Shehan v. Hampton, 8 Ala. 942.

5. It is certain, that the proof offered, or at least a part of it—that the deputy was at the time he left the State in 1844 solvent, &c., &c., and that he had subsequently become insolvent, &c.—was *prima facie* inadmissible. The plaintiffs in error had not proved any fact, which made the evidence so offered admissible, nor did the plaintiffs in error make the

offer in connection with any fact which made it admissible.—The plaintiffs in error assumed that the notice they had proved to the sheriff, made it legitimate for them to adduce the proof of the solvency and insolvency of the deputy as offered by them. But they claim for that notice a virtue which the law does not accord to it. That notice is wholly nugatory, and they can claim no right from it. There was no error in rejecting the evidence as offered by the plaintiffs in error.

6. The refusals to charge as asked by plaintiffs in error and the charge given by the court below, are free from error. Fournier v. Curry, 4 Ala. 321; Cogburn v. Spence, 14 Ala. 549. The plaintiffs in error, in the charges asked, assume that they were invested in this suit with all the rights which the defendant in execution might have had on a motion to quash the execution. They further assume, that the execution under which the deputy collected the money on the 27th August, 1841, was on that day actually void; and that although he acted as deputy sheriff under that execution, and made his return thereon, and received the money thereunder before its return day, he did all this without any authority, notwithstanding all the parties to that execution treated it then as valid, and still treat it as valid. The question presented by the refusals to charge, cannot be made available to the plaintiffs in error, at least whilst the execution and the return thereon are permitted to stand. That return estops the deputy who made it and also his sureties, because done by him in discharge of a duty covered by the bond.—Clarke v. Gary, 11 Ala. 98; Holt v. Robinson, 21 *ib.* 106. In this case last cited, the return was by a deputy who was held estopped.—See also Price v. Cloud, 6 Ala. 248.

CHILTON, C. J.—We know of no principle of law, which enjoined it as a duty upon Gewin, the principal sheriff, to notify the sureties of his deputy of the default of the latter, previous to the institution of an action against them. The creditor must not actively interfere to the prejudice of the surety of his debtor, but he is not bound to keep the surety advised of facts, a knowledge of which may be necessary for his protection. The surety must be on the alert, and protect

himself. The creditor may repose upon the indemnity which their liability to him furnishes for the default of his deputy. He may remain passive, so that he brings his suit within the period required by the statute applicable to such cases. If the securities desire to protect themselves, and provide against liability which they may have incurred, it was their privilege to have the account taken, and to see that McGehee did not leave the country full-handed without paying the amount for which they were bound. It follows, that the condition of McGehee at the time he left this State, and since, had nothing to do with the liability of his sureties, and the evidence relating to it was properly excluded.

2. The charges which the court refused to give appear to be based upon the idea, that the payment by the principal sheriff of the amount of the execution to the plaintiff therein, while such writ is in full force in the hands of the deputy, satisfies such demand, and deprives the deputy of all legal authority to collect the same; and having no authority to collect, his sureties are not bound to pay the money thus collected. This is not a correct view of the effect of such payment. If the plaintiff in execution receives payment from the sheriff, the defendant in the execution may set up such payment, and have satisfaction entered. But this is a privilege which is personal to him; he may waive it, and allow the execution to proceed, and the money to be made; and if he does so, it is not for the deputy who collects the money to say, "I had no authority to do so;" neither can his sureties set this up. If the defendant in the execution interferes so as to prevent the sheriff from proceeding for his indemnity, by reason of the payment which has been made by the latter, and sets it up as a satisfaction, he becomes liable to the sheriff for the amount thus paid, in *assumpsit*.—13 Ala. 357. But if he waives the payment, and permits the execution to proceed, no one else can take advantage of it.—Fournier v. Curry, 4 Ala. 321; Mooney & Black v. Parker, 18 *ib.* 708, where the cases relating to this subject may be found collated.

3. As to the charge, which proceeds upon the idea of a *tender* of the money by the deputy to the principal sheriff, &c: We think the court properly refused it—first, because it was abstract; the proof being, not that the money was tendered,

but merely that the deputy "*proposed* to pay it to Mr. Gewin, who told him that he (the deputy) would see the persons it was going to, and that he could pay it to them." This, in legal contemplation, was no tender, nor was it, as the charge asserts, "permitting the money to remain in the hands of the deputy" after declining to accept the money on a tender; but it amounted to a direction to the deputy to pay the money to the persons entitled. It was a part of the deputy's duty to do this, upon the direction of the principal sheriff—a duty covered by the bond sued on; and if he failed to do this, and retained the fund, in consequence of which the sheriff had to pay it to the parties entitled (for this evidence would seem to imply Gewin had not then paid the money to the parties entitled to it), the latter had the right to recover, and the charge prayed for was improper.

4. The notice given by Felton to Gewin, that he would no longer be bound as security for McGehee, amounted to nothing. The statute makes no provision for a surety's discharging himself in this way, in cases of this character.

5. There is no error available to the plaintiffs in error, in the charge given. It conforms substantially to the views we have above expressed, except that it is too favorable to them in respect of the right of the sureties to discharge themselves by surrendering their principal.

Let the judgment be affirmed.

LIGON, J., having been of counsel before his election to the bench, did not sit in this case.

LOVE *vs.* GRAHAM ET AL.

1. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to the separate use of the wife, will be reformed in equity on her application.
2. A married woman, whose trustee refuses to interpose a claim at law to

protect her separate estate when taken in attachment by her husband's creditors, may come into equity for relief.

3. As to slaves which are shown to have been purchased by the husband with his own means, although the bill of sale was taken in the name of his father as trustee for his wife, the injunction will be dissolved, and the creditor allowed to proceed at law; but as to others which are shown to have been partly purchased with choses in action belonging to the wife's separate estate, the injunction will be perpetuated, without prejudice to the creditor's right to file a bill to separate the interest of the husband from that of the wife.
4. Where the bill asks a reformation of the marriage articles, an injunction against the proceedings at law on the part of the husband's creditors, and general relief, if it also appears that the trustee named in the deed has resigned, the court may appoint another in his stead.

ERROR to the Chancery Court at Wetumpka.
Heard before the Hon. JAMES B. CLARK.

THIS bill was filed by Carolina L. F. Love, against her husband (Addison C. Love) and John G. Graham; its object was, the reformation of the ante-nuptial agreement entered into between complainant and her said husband, and an injunction against further proceedings at law by the said Graham under an attachment which he had sued out against said A. C. Love, and which had been levied on certain slaves claimed by complainant as her separate estate; there is also a prayer for general relief. The chancellor decreed a reformation of the marriage articles, a perpetual injunction as to two of the slaves attached, Merrick and Burton, which were included in the marriage contract; dissolved the injunction as to the slave Isaac, on the ground that he did not belong to the wife's separate estate, and also as to Lucy and her child, but without prejudice to the right of either party to file a bill for the purpose of separating complainant's interest in them from that of her husband; and also directed the register to report a suitable person to act as trustee in place of Erasmus Love, who was shown to have resigned.

Each party assigns errors in this court; on the part of complainant, because the chancellor dissolved the injunction as to the slaves Isaac, Lucy, and her child; and on the part of Graham, 1st, because the chancellor received testimony of conversations between Mr. and Mrs. Love anterior to the execution of the marriage articles; 2d, because he decreed the

reformation of said marriage articles; and, 3d, because he perpetuated the injunction as to the slaves Merrick and Burton.

ELMORE & YANCEY, for the complainant, contended:

1. That the evidence in the cause showed, that the three slaves as to whom the injunction was dissolved were purchased, at least partly, with the funds of the wife's separate estate; and therefore the husband's creditors could not attach and sell them at law, but must file a bill in equity to separate his interest from that of his wife.

2. That the allegations of the bill, to the effect that complainant only charged her husband with mistake, and not with fraud, did not prevent her proving fraud against him; "that fraud is a deduction from facts, and however characterized, the conclusion must be the same."—Reid v. Clark, 1 Speer's Eq. R. 350.

N. S. GRAHAM, *contra:*

Where both parties have been mistaken, and the fact about which they were mistaken was from its nature doubtful at the time of the agreement, courts of equity have refused relief.—1 Mad. Ch. 75. A mistake as to law is no ground to reform a deed.—*Ib.* 72; Shotwell v. Murray, 1 Johns. Ch. R. 516; Lyon v. Richmond, 2 *ib.* 51: Storrs v. Barker, 6 *ib.* 166; Haden v. Ward, 15 Ala. 149; Stone v. Hale, 17 *ib.* 557; 1 Story's Eq. 125, 126-7-8-9. If a contract be entered into under a mistake of law or fact, but in good faith, each party possessing equal means of information, or equal means of acquiring it, and neither having practiced any unfairness or deception towards the other, equity will not relieve against it.—Juzan v. Toulmin, 9 Ala. 662. Where the words are plain, evidence as to the intent, or to show that there was a mistake of the fund, is inadmissible.—1 Mad. Ch. 83; 4 Vesey 676.

The evidence shows, that there was not a mistake of fact; the complainant, with the witnesses, discussed the instrument some days before it was executed, and were satisfied with it. It is, therefore, a mistake as to the legal consequences or effect of said instrument, and cannot be reformed. It speaks the

true agreement.—Trapp & Hill v. Moore & Borden, 21 Ala. 693; Larkins *et al.* v. Biddle *et al.*, *ib.* 252; 1 Story's Eq. 128. The agreement of parties cannot be altered by the courts.—*Ib.* It is not pretended that complainant was mistaken or misled as to any fact connected with the agreement. Equity has power to compel parties to perform their agreements, but has no power to make agreements for them and compel them to be executed. There is no evidence tending to show a mistake of the draftsman. It was left to the honor of defendant, A. C. Love; he prepared the agreement as he understood it; no fraud is alleged; it is repudiated. In Hunt v. Rousmaniere's Adm'rs, 1 Peters 1, it is said: "We mean to say, that where the parties, upon deliberation and advice, reject one species of security and agree to another, under a misapprehension of the law as to the nature of the security selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument agreed on."—1 Peters 1; also, 21 Ala. 256.

The bill ought to be dismissed, because the allegations are contradictory, and because the proof does not correspond with or sustain the allegations, neither as to what the agreement was, nor as to how, nor by whom the negroes Isaac and Lucy and child were bought and paid for.—Bryan & McPhail v. Cowart, 21 Ala. 92; Adams v. Garrett, 22 *ib.* 602; Larkins *et al.* v. Biddle *et al.*, *ib.* 252. The subscribing witnesses prove, that at the time of executing the instrument, complainant asked, "Did it secure to her her property, as was intended by her? the answer was, it did; and the instrument was signed." Now, does this prove what the agreement was? Do the witnesses know what was intended? Does this sustain the allegation of the bill, that *all* of the property, "negroes, notes, moneys, and choses in action," were to be included in said deed?

Evidence of conversations or declarations anterior to the making of the instrument, must be received with greater caution than those made at or subsequent to the execution, because the agreement, as originally understood, may have

been abandoned or altered.—Fonb. Eq., b. 2, ch. 5, § 3, n. 1, p. 433; Channell v. Lowthwaite, 2 Vesey jr. 473; Trimmer v. Bayne, 7 Vesey 508; Langham v. Stanford, 17 *ib.* 443; Richards v. Dutch, 8 Mass. 506.

But even if there was a mistake as to the moneys, it stands in this court as an ante-nuptial parol contract, which is void and obnoxious to the statute of frauds.—1 Story's Eq. 312, 313-14, and notes, pp. 367, 262; Andrews v. Jones, 10 Ala. 420; Roper on H. and W. 307; 1 P. Wms. 118, 120, 619; 2 *ib.* 245; Story's Eq., ch. 7, 368, 375, and notes; *ib.* 128; Read v. Livingston, 3 Johns. Ch. R. 481.

LIGON, J.—The bill in this case seeks, 1st, a reformation of the marriage articles between the complainant and Addison C. Love, her husband and one of the defendants; 2d, an injunction as to the defendant Graham, who seeks at law to charge certain slaves with the payment of a debt due to him from A. C. Love; and, 3d, to have a trustee appointed to protect the separate estate of the complainant, in the place of Erasmus Love, who was appointed to that office by the marriage articles, and who has resigned his trust.

Whether the relief sought in the first aspect of the bill should be granted, must depend upon the proof in the case in respect to the verbal agreement between the parties in relation to the property owned by Mrs. Love before her marriage, and the failure of the marriage articles, from the fraud or mistake of the draftsman, correctly to embody the terms of that agreement. It appears from the proof, that A. C. Love, the husband, was the draftsman of the deed of settlement; and as he was a party to it, he must be presumed to know what property of the wife was intended to be embraced in it; and if any of this is omitted, by his fraud or mistake, it is the duty of the court so to reform the deed, as to make it include such property, and thus truly express the intention of the parties.

We concur fully with the chancellor, that the proof in this record is clear to show that the marriage articles exhibited do not conform to the directions given to the draftsman, or the terms of the verbal agreement in regard to the kind and quantity of the property intended and agreed to be secured to

the separate use of Mrs. Love. The testimony of her grandmother, her mother, and several other witnesses, is full to the fact that all the property of Mrs. Love, her money and choses in action, as well as her slaves, were to be so secured; yet the two former are omitted in the deed. The circumstances under which it was executed by the wife are such as to forbid the idea that this omission was by her consent, or arose from any change of the original intention of the parties, occurring after the terms were agreed upon and the deed was drawn. She does not appear to have had any further connection with the matter, from the time when the directions were given until a few days before her marriage, when it was read to some of her friends, in her presence, by A. C. Love, and he was asked whether it included the money due to her from her guardian; to which he replied, "*it did;* that the word '*proceeds,*' as used in the deed, included it." But a few minutes before the marriage, the deed was brought to her by A. C. Love, the intended husband, and on his assurance that it secured to her all her property, she executed it.

We think she had the right to confide in the representations of A. C. Love. He was about to become her husband, and from this very relation may well be supposed to possess her fullest confidence, and to exert a controlling influence over her. In such circumstances, the law does not require of a party that degree of circumspection and diligence which would be required in persons who are so situated as to be able to deal at arm's end with each other. We are constrained to hold, with the chancellor, that the representations made by A. C. Love amount to a fraud upon his wife, and that the omission of the money and choses in action out of the marriage articles was less a mistake than a fraud. We regard the allegations of the bill as substantially charging fraud, as well as mistake. It is true, fraud is not alleged in terms; but facts and circumstances, from which fraud is the only legitimate inference, are set out in the bill, and this is sufficient.—Kennedy v. Kennedy, 2 Ala. 571.

It is a matter of indifference, however, whether the omission in the deed results from mistake or fraud; if the deed fails to show the true agreement between the parties, or to express their avowed intention at the time it is made, for either rea-

son, a court of equity should reform it, when application is made to it for that purpose, and the fact is made to appear.

There is no error in the decree reforming the articles of marriage settlement between A. C. Love and the complainant. 11 Ala. 187; 1 *ib.* 161; 8 *ib.* 345; 5 *ib.* 761; 10 *ib.* 548.

As this deed was fairly entered into, its terms will protect the separate estate of the wife from being made liable for the debts of the husband; and it was the duty of the trustee, when a levy was made on it for this purpose, to interpose a claim to it under the statute, and have the right to it tried at law. But in this bill it is charged, and this allegation is not denied, that Erasmus Love, the trustee, refused to interpose such claim. The wife is not allowed to do so, and if she is denied the right to appeal to a court of chancery for redress, no remedy would be open to her, and, in this respect, there would be a failure of justice. We have heretofore held, however, that in such cases a court of equity may interpose by injunction, and afford her full relief.—Calhoun v. Cozens, 3 Ala. 498; Bridges & Co. v. Phillips, at the present term.

In the present case, it appears that the defendant Graham caused his attachment to be levied on two of the slaves mentioned in the deed of settlement, and as to these the chancellor correctly perpetuated the injunction. In respect to the slaves Isaac, Lucy, and her child, James Burton, the case is materially different. Isaac was purchased by A. C. Love in his own name, and, from all that appears in the record, was paid for with his own money. There is no evidence whatever, which goes to show that any portion of his wife's funds was used for this purpose, unless such presumption could arise from the fact that the bill of sale for him was taken in the name of Erasmus Love, the trustee. This presumption is very fully rebutted by other facts in the case, which tend very strongly to show, and we think conclusively do show, that the purchase money was paid by A. C. Love out of his own means. When he proposes in writing to make the purchase, he says nothing about buying on account of his wife, but makes the proposition in his own name, and refers to the fund out of which he expects to be able to make the payment, viz., money which he expects his father to obtain for him in North Carolina. Five hundred dollars of this purchase money were

paid before he got possession of his wife's funds, and his own note is executed for the balance, which he afterwards pays at different times, and then takes the bill of sale in the name of his father as trustee for his wife. We agree with the chancellor, and believe this was "an after-thought," and was an effort to cover his own property under the name of the trustee of his wife, who seems never to have had it in his possession, or in any manner to have interfered with, or had a knowledge of the purchase. The injunction was rightly dissolved as to this slave.

In respect to Lucy and her child, the weight of evidence preponderates strongly to establish the conclusion of the chancellor, which is, that they were paid for in part with the funds of the husband, and partly with the choses in action belonging to the wife's separate estate. The trustee had no agency in this purchase, nor any possession of the slaves. It does not, however, appear in what precise proportions the funds of the husband or those of the wife were used in this purchase; but it is evident that both of them have an interest in these slaves. This, however, will not authorize a creditor of the husband to proceed at law to sell his interest for the payment of his demand. We have already held, that in such cases the judgment creditor must proceed in equity to separate the interest of the wife from that of the husband; and when the latter is ascertained, it may be devoted to the payment of his debt by a decree of that court.—Bridges & Co. v. Phillips, at the present term, and cases there cited. In the case last cited, the creditor is required to become the actor in such proceedings; all that the wife can do is, to protect her interest by injunction. It would be wrong, therefore, to dissolve her injunction, as it would leave to the creditor the privilege of selling the property under his process at law.

We do not understand the chancellor as holding a different doctrine, but in drawing up his decree, we find it so worded as to dissolve this injunction as to these slaves, and this can only result in compelling the complainant to a second suit in chancery against Graham, which (without a cross-bill on his part) will accomplish no more than can be attained under the present bill. The decree of the chancellor must be here amended, so as to retain the injunction as to the slaves Lucy

and her son, James Burton, but without prejudice to the right of Graham to proceed in equity to ascertain what interest A. C. Love holds in them, to separate such interest from that of the complainant, and charge it with the payment of his debt.

As Erasmus Love has resigned his trust, it was both proper and necessary that the chancellor should have appointed another. This he was proceeding to do, when his action was arrested by the writ of error in this case. Under these circumstances, the cause must be remanded to the court of chancery, that such trustee may be there appointed.

The decree of the chancellor is affirmed in all things, except so far as it has been herein corrected. As both parties have here assigned errors, and neither set of errors has prevailed, each party must pay half the costs of this court; and the costs of the court below must be paid as directed in the decree of the chancellor.

BRYAN AND WIFE *vs.* WEEMS, EX'R, &c.

1. A decision of the Supreme Court is conclusive when the case in which it was rendered is brought back a second time on appeal.
2. If a woman marry before the expiration of the term for which her slaves are hired out, the hire for the unexpired portion of the term, though included in the notes taken, is a part of the income (and not the *corpus*) of her estate, and therefore her husband is not accountable for it under the act of 1848.
3. If the wife dies intestate as to a portion of her estate only, her husband is entitled, under the acts of 1848 and 1850, to one half of the personal property undisposed of.
4. On a final settlement by the husband of his administration on his wife's estate, he is entitled to a credit for payments made by him during the marriage of debts contracted by her while sole which constituted a charge on her separate estate.

APPEAL from the Court of Probate of Marengo.

SAMUEL W. WEEMS, as executor of his wife Penelope, having been cited by the appellants to settle his administration on her estate, the following rulings of the court in his favor

were excepted to, which are now assigned for error: In allowing said executor credits for debts contracted by his wife before her marriage, and paid by him after marriage; in refusing to charge him with the whole hire of her negroes during the year 1849, and in only charging him with the *pro rata* value of the hire from the first of January to the time of marriage in March, 1849; and in the order of distribution allowing him one half of the estate as to which the wife died intestate.

Wm. M. Byrd, for the appellants:

1. The property of the testatrix having vested in her by her marriage in March, 1849, under the "woman's law" of 1848, it was out of the power of the Legislature to divest, or interfere with, her title by the subsequent act of 1850, and by the Code. The right of the testatrix to the profits of her estate, was perfect, and vested in her by the act of 1848, and having vested under that act, she had the absolute title in them which the Legislature could not divest or control. If the principle of the sanctity of "vested rights" is held applicable to the estate which vested under the act of 1848 in a married woman in her own property, then the court below erred in refusing to charge said executor with said notes given for hire in 1849, should the court come to the conclusion that said notes should be taken to be the profits, and not the *corpus* of the estate.

2. The notes given to the guardian previous to the marriage, as to the husband, must be taken as a part of the *corpus* of the estate; and the court below, therefore, erred in refusing to charge said executor with the whole of said notes. This court has held, that the hire of a slave for a year is an absolute sale of his services for that time, as much so as a sale for life, except in the first case the law implies certain duties on the part of the person who hires, which it does not do in the latter; and it cannot be doubted that, if the guardian had sold the slave, and taken a note, due twelve months after date, and then the marriage had taken place before the money was due, the note would have been a part of the *corpus* of the estate without any abatement, and therefore must be so held in the case of a hiring.

3. The husband is by the statute constituted trustee of the wife's estate, without being liable to account for the profits, and should the court hold that she is not entitled to the profits under the act of 1848, but that the same can be held by the husband under the Code; then it is insisted, that as the evidence shows that such profits largely exceed the debts paid by the husband during the marriage, though contracted before, said debts should be considered as paid by him out of such profits, and should not be a charge on the *corpus* of the estate, and therefore the court below erred in allowing said executor such debts in his account, thereby charging them on the *corpus*. The husband; though not held to account for such profits, in law and equity must be considered as holding them for the benefit of the wife; and should he pay her debts, as in this case, during the marriage, the court should consider them as paid out of the profits to the extent thereof. As other trustees, he should pay all debts and incumbrances out of the profits until they are exhausted, before he can charge the *corpus* of the estate with them.

4. The law provided that the husband, on the death of the wife "intestate," should be entitled to one half of the estate. But the wife did not die "intestate," and the Code does not provide for the husband in case the wife dies testate; and therefore the court erred in making a decree in his favor for one half. This point must be determined from the construction to be given to the law, and therefore it is submitted that the above is the proper construction to be given under the rules governing the same.

A. R. MANNING, *contra*:

I. Even though a testator, in giving to one of his sons or daughters a part of his estate, say expressly "he (or she) shall not have any more thereof," and he dies intestate as to a part of his property, the legatee is entitled by law to a distributive share of that.—Denson and Wife v. Autrey, ex'r, &c., 21 Ala. 205 (especially 208–9). 2. According to the proposition contended for by plaintiffs in error, if a married woman, having under the acts of 1848–50 an estate worth $100,000, should at her death leave a will providing for the emancipation of a favorite slave, and making to him a small bequest,

or should make such a bequest to a friend, the surviving husband is to be thereby deprived of any share of all the rest of her property, as to which she dies intestate. To this extent the principle would operate. I understand the acts referred to, in this regard, as simply placing the husband in the list of distributees, and defining the portion he is to receive as such.

II. If the slaves had not been hired out, the husband would have been entitled under the law to their service, or the profits to be made thereby during the same period. How then, upon principle, can he be deprived of the hire earned after the marriage? It is not the *corpus* of her estate, but income arising from it after the marriage: and this the law gives to him. 2. Suppose the wife, before marriage, had hired her slaves for a period of 20 years, or for life, not for a round sum paid in hand (which being substituted for the slaves, might be used as capital, and itself be made to produce annual income), but for smaller sums, of either certain or uncertain amounts, to be paid at the end of each year of service, either as hire, or a proportionate share of the profits of the business in which the slaves should be employed. Or, suppose the body of the wife's estate to be money which she had already let out upon bond and mortgage for a series of years, on which interest was to be paid annually by the borrower. Would not the husband, under the law, be entitled to the hire or profits in one case, and the interest in the other? And what is the difference in principle between the cases supposed, and that we are considering? 3. The point was decided, however, when this cause was here before.—See 21 Ala. 306–7.

III. That the debts paid by the husband during the marriage were to be paid out of the *corpus* of her estate (which, *quoad* the husband, constituted a part of the income and profits previous to the marriage and then on hand), and an allowance to the amount of them was to be made in favor of the husband on the settlement of his trusteeship, was decided between these same parties before.—Weems v. Bryan *et al.*, 21 Ala. 307. 2. Besides, it is a familiar principle that an executor, in paying the debts of his testator, shall first exhaust the property which is not specifically bequeathed, so as not to cause an abatement of the specific legacies. In this case, the will not being operative as the testatrix intended, so as to give

to her husband all her estate, and the slaves mentioned being given to him specifically and by name, they are not to be taken from him unless necessary for the payment of debts. Nay, if a specialty creditor in England, for whose debt the lands of a testator were liable (as they are here for a debt of any kind), should obtain payment by the sale of chattels of which a specific bequest had been made, the law would so marshal the assets as to make the lands, which would otherwise have descended to the heir, respond for the amount to the legatees. If this were so in a country under whose law of primogeniture and other institutions, the heir is a kind of legal pet, and lands of much more dignity than other kinds of property, so that the perpetuation of them in the family to which they belong is a matter of great consideration, certainly the rights of a legatee and the will of a testator are entitled to as much respect here. Our statutes now declare, as reason and religion before had done, that husband and wife are nearer of kin than brother and sister; and as legatee of each other, either would be entitled to the benefit of the rule by which assets shall be marshalled for such. Much more shall the legacy to the husband be protected from abatement, when there are other personal assets not disposed of by the will, out of which the debts of testatrix can be paid.

But really these questions do not arise upon this assignment of error. The husband paid the wife's debts in her lifetime, out of her moneys in his hands, and without dissent on her part; and he so accounts for said moneys in the settlement of his trusteeship in the Probate Court. The matter was therefore all properly settled.

GOLDTHWAITE, J.—When this case was last here (21 Ala. 302) we held, that the husband, after the death of his wife, could not be required to account for the income of her separate estate received by him during coverture; and this decision is conclusive upon us in the present case.—Price v. Price, 23 Ala. 609, and cases there cited. It is urged, however, on the part of the appellant, that the husband was bound to account for the hire of the slaves forming the separate estate of the wife, accruing from the time of the marriage—the 31st March, 1849—until the 1st January, 1850, for the

reason, that this hire was included in notes given to the wife, before marriage, and must, therefore, be regarded as of the *corpus* and not the income of her estate. Suppose a marriage settlement had been made, by the terms of which the wife was to hold the slaves, and take the hire up to the time of the marriage, to her sole and separate use; and the husband to receive the hire, which should accrue during coverture?—Would it be doubted, that under such circumstances the husband would be entitled, as against the wife, to that portion of the hire which accrued after the marriage? The third section of the act of 14th February, 1850, (Acts 1849–50, p. 63), makes just this contract. It absolves the husband from liability to account for the profits during coverture; so that the only question is, whether the amount received was for the labor and services of the slaves during the marriage; if it is, then, by force of the statute, there is no liability. That it was received by the husband upon a contract of hire made by the wife before marriage, does not change the nature of the fund: it is still the profits of the separate estate accruing during coverture.

It is insisted by the appellant, that, as the wife died intestate only as to a portion of her estate, the husband was not entitled to one half of the personal property undisposed of by her will; but this position cannot be sustained. Under the acts of 1848 and 1850, the husband as a distributee is entitled to take absolutely one half of the wife's personal estate, unless she makes a different disposition of it by will; and a case of partial intestacy falls under the general law applicable to cases of that character, which provides for distribution of the property not bequeathed as if no will at all had been made.—Clay's Digest 597 § 7; Denson v. Autrey, 21 Ala. 205.

Neither was there any error in the action of the court, allowing to the husband, as executor, the payments he had made out of her estate for debts incurred by her before marriage; the record showing that these debts were a proper charge against such estate in the hands of her guardian. Under the acts to which we have before referred, the husband, by virtue of the marriage, occupies the position simply of trustees of the property belonging to his wife; and certainly a trustee

might well out of the trust estate pay debts which were a legitimate charge upon it, before he became the trustee; and if he paid those debts out of his own money, he should in justice be entitled to look to the property to which they were properly chargeable to reimburse himself.

The ruling of the probate judge on the questions considered, being in conformity with the law, the judgment is affirmed.

MARTIN'S EXECUTRIX *vs.* MARTIN.

1. Trover for the conversion of a stolen slave cannot be maintained against the thief before the institution of a prosecution against him for the felony.
2. A rule which has become settled law, is binding on the courts, and should be followed.
3. In trover for the conversion of a slave, which the evidence tended to prove had been stolen by the defendant, plaintiff having introduced evidence to show that defendant and his accomplice, by whom the slave was run off, "were quite intimate and friendly, and acted in concert," *held*, that defendant might rebut this evidence by proving that his alleged accomplice "manifested great hostility to him."
4. A person who removed into the neighborhood of an impeached witness, about the time the latter left, is competent to testify to his general reputation in that neighborhood at that time.
5. A witness may testify to the general character of an impeached witness for truth and veracity, both from his own knowledge and from what he has heard from other persons; and he may state that it is "very unfavorable."

APPEAL from the Circuit Court of Perry.

Tried before the Hon. THOMAS A. WALKER.

TROVER by Mary Martin, as executrix of Shadrach Martin, deceased, against Levi Martin, for the conversion of a slave named Jason. The record does not show what the pleas were; but the defence seems to have been rested upon the ground, that the defendant, if guilty at all, had stolen the slave, and had never been prosecuted for the felony. One Joseph Smedley, who lived with the defendant during the years 1847 and 1848, testified, on behalf of the plaintiff, that

the defendant kept said slave harbored and secreted about his house and farm during the fall of 1847, and furnished him with the means of escaping from persons who were searching for him; "that defendant then procured one Blake to take said slave off, and it was agreed between them, that Blake was to carry the slave off, sell him two or three times, and then take him to a free State, and send back to defendant one half of the proceeds of the sales; that in accordance with this agreement said Blake came to the defendant's house in the night time, got the slave, and left the same night with him, and witness has never seen said slave or Blake since; that Blake promised witness, on the night he left with the slave, that he would pay him $10 if he would keep this affair secret, and if he did not send back the money defendant would pay him to keep it secret." Plaintiff, having proved property in the slave, as executrix of her testator, his value, &c., and it being admitted that she was executrix, here rested her case.

"Plaintiff having introduced evidence tending to show that defendant and Blake were quite intimate and friendly, and acted in concert, and had agreed and procured Blake to run off the slave; for the purpose of rebutting this evidence, defendant offered the deposition of Jane Butler, who testified, among other things, that she was acquainted with Blake, who taught school in her neighborhood in 1847, and boarded at defendant's house; that the school was broken up in consequence of defendant's taking away his children some three weeks before the time had elapsed for which Blake had agreed to teach; that after his school was broken up, Blake left defendant's house, and came and boarded with witness for about three weeks, and then left, and she has not heard of him since; that during the time he boarded with her, *Blake manifested great hostility to the defendant.*" Plaintiff objected to the reading of that portion of the deposition which is italicized; but the court allowed it to be read "by way of rebuttal only," and plaintiff excepted.

"It was in evidence that the witness Smedley came from Autauga county to the defendant's house in Perry, remained there during most of the years 1847 and 1848, and then went back to Autauga. The defendant introduced one Champion Butler as a witness, who testified, that he had no

acquaintance in the neighborhood of the defendant, nor with the character of Smedley in that neighborhood, until he moved into said neighborhood some three or four years before this trial, and that Smedley had left the neighborhood before he removed into it. Plaintiff objected to said witness' testifying to said Smedley's character for truth, on the ground that he did not reside in Smedley's neighborhood, and did not know him personally, until after he had left Perry county and gone to Autauga, and did not know his character among his neighbors while he resided in Perry, but learned it after he (witness) had removed into the neighborhood where Smedley had lived. The court overruled the objection; and thereupon the witness testified, that he knew Smedley's general character for truth among his neighbors and those who knew him, and that his character was bad, and he would not believe him on oath."

The defendant also offered the evidence of Sophia Riley for the purpose of impeaching the witness Smedley, who testified "that she is acquainted with Smedley's general character for truth and veracity in his neighborhood and among his neighbors: his character in this respect is *very unfavorable*." Plaintiff objected to the admission of the expression which is italicized; but her objection was overruled, and she excepted. Plaintiff then read to the court the answer of this witness to the third cross interrogatory, which is as follows: "I state what I have said about Joseph Smedley's general character, both from my own knowledge, and from what I have heard from others. I dont think I would believe him on oath; this founded both on my own personal knowledge of him, and what others say of him;" and thereupon again moved to exclude said evidence from the jury; but the court overruled the objection, and plaintiff excepted. "There was no proof made or offered that plaintiff, or any one else, had prosecuted the defendant for stealing the said slave."

The court charged the jury, at the request of defendant's counsel, that, if they believed the evidence of Joseph Smedley, the defendant was guilty of a felony, and the private injury was merged in the felony, and plaintiff could not recover in this action until it was shown that she, or some one else, had prosecuted him for the felony. The plaintiff excepted to

this charge, and took a non-suit; and she now assigns for error all the rulings of the court above stated.

I. W. GARROTT, for the appellant:

1. The idea that a civil remedy is merged in a felony, or suspended until the felon is criminally prosecuted, is unsustained by reason, is contrary to the spirit of the institutions of our country, and in practice is violative of the constitution of this State. The doctrine had its foundation in the law of forfeiture, as it existed in England, and has never had any reason in favor of its existence in this country. At the common law, the felon forfeited not only all his own goods, but also the stolen goods, unless the rightful owner recaptured them before their seizure by the public authorities.—4 Bacon's Abr., p. 340, title "Forfeiture" (B). If the owner did not pursue and appeal the felon, he lost his goods forever; and at common law there was no restitution on any prosecution whatever, except an appeal of larceny.—*Ib.* 341, § 6; *ib.* 162, § 10; 1 Hale's P. C., 546-7. Appeals of felony never have existed, and never can exist, in this country, until our constitution is altered or abolished; because no man can be put on his trial for an indictable offence, except on presentment of a grand jury.—Const. Ala., art. 1, § 10. Even in England appeals of felonies have been abolished by stat. 59 Geo. III, c. 46.—1 Bac. Abr. 291. So that the common law, if admitted to exist here, would strip the owner of his goods forever, and not even mock him with the pretence of a remedy; the only remedy known to it having been taken away by the constitution. The inconvenience and injury resulting from appeals was remedied by stat. 21 Henry VIII, c. 11, which gave the owner a writ of restitution of his stolen goods; but as we have no such statute, we are still left where we would have been if it had never existed.

As the principle of the common law was, that the felon, on conviction, forfeited his lands and goods to the king, it was, of course, the king's interest that he should be prosecuted; and hence the policy of requiring a criminal before allowing a civil prosecution. But with us, the felon does not, on conviction, forfeit his lands and goods, because "No attainder shall work corruption of blood nor forfeiture of estate."—Const.

Ala. art. 1, § 20. Why, then, should he, or his heirs, retain his estate, and use and enjoy it, while the man whom he has defrauded, and whose property he has stolen, is barred the right of recovery. *Ratione cessante, cessat etiam lex.*

By section ten of the first article of our constitution it is provided, "that no person shall be deprived of his life, liberty, or property, but by due course of law"; and in Middleton v. Holmes, 3 Porter 427, this court say: "If the defendant has not been tried for the felony, and should never be, he will never be liable to the plaintiff"; and such is the legitimate result of denying the civil action until the criminal is prosecuted. If then, from infancy, coverture, or any other cause, the owner is unable to prosecute, he is deprived of his property "without due course of law." Again; the constitution (art. 1, § 14) provides, that "all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay." If the State can say to the owner of stolen property, You shall not recover your property unless you undertake and carry through a prosecution in my name against the felon, is this not a "*sale*" of the right of action, of which the price is the trouble, odium and costs of a criminal prosecution? If he refuses to accept these terms, and persists in his refusal, right and justice are "*denied*" him; and if he accepts them, and undertakes the prosecution, still he is "*delayed*" in his rights. Again; the provisions of the twenty-ninth section (art. 1) are worthless, if the doctrine asserted by Middleton v. Holmes, *supra*, is established as law.

The case of Beasley v. Mitchell, 9 Ala. 780, is the only case of like character with the present. The cases of McGrew v. Cato's Ex'rs (Minor's R. 8), Morgan v. Rhodes (1 Stew. 70), and Middleton v. Holmes (3 Porter 424), were all cases for killing slaves—that is, cases which *prima facie* involved felonies in their commission; and the case of Blackburn v. Minter (22 Ala. 615), was for an injury to the person who brought the suit. These cases do not necessarily involve the principle contended for in this case; and if they do, it is submitted, they are in conflict with the case of Beasley v. Mitchell, *supra*, in which it is directly decided that the owner of stolen

goods may maintain an action against a purchaser from the thief, without first prosecuting the thief, although the contrary was held in England in the case of Gimson v. Woodfall, 2 C. & P. 41. Now, if public policy demands a criminal prosecution before the injured party shall have a remedy against the thief, a recovery certainly ought not to be allowed against the receiver of the stolen goods from the thief himself; if the object is that the thief shall be prosecuted, he surely ought not to be allowed to escape by putting the stolen goods out of his hands. But the court, in that case, say: "Although the impression is so common, that the person whose goods have been stolen cannot have restitution without a prosecution of the thief, yet it is entirely without foundation; the doctrine has no other foundation than as connected with forfeiture, and even then only to a limited extent."—p. 785. "If the owner has the right of recaption, we apprehend, it carries with it the right of suit to the same extent." This principle is believed to be decisive of this case.

The right to maintain a suit without a prosecution of the felon, has been held in seven of our sister States, and a very strong intimation given in the eighth, as will be seen by an examination of the following authorities: Ballew v. Alexander, 6 Humph. 433; Pettingill v. Rideout, 6 New Hamp. 454; White v. Fort, 3 Hawks 268; Allison v. Bank, 6 Ran. (Va.) 223; Boardman v. Gore, 15 Mass. 336; 1 U. S. Digest, p. 61, § 76, referring to Pr. (Ky.) Dec. 203; 1 Const. (S. C.) R. 231; Robinson v. Culp, 3 Brev. 302; Mitchell v. Mimms, 8 Texas R. 6; Arnandez v. Lawes, 5 Ann. La. R. 127; 6 *ib.* 65; *ib.* 472; Adams v. Childress, 10 Miss. 778.

Public policy does not require the maintenance of this doctrine, though it does require that crime should be punished. The temptation on the part of the owner to compound with the felon would be much greater, if he knew that he was forced to carry through a criminal prosecution before he could recover his property, than it would be if he had an immediate right of action, with the almost absolute certainty that the grand jury would present the criminal, at least after his exposure in the civil suit. But, conceding that public policy does require the maintenance of the doctrine, then it follows, that public policy—in other words, the public, for

the promotion of the public interests—demands the use of private property. But how can the public take private property "without just compensation"?—See 5th Amendment to U. S. Const. The doctrine cannot be carried out in practice, without either forcing the owners of property to expend their own labor, time and money for the use of the public, under penalty of its entire loss in case of their refusal, or depriving them at once of their property without any compensation whatever.

2. The court erred in allowing Mrs. Butler to testify that Blake "manifested great hostility to the defendant." It does not appear that defendant was present, or had anything to do with producing such hostility; nor was it shown whether the hostility was manifested by words, or by acts: if by acts, they ought to have been proved: and if by words, the evidence was hearsay. Without this proof, it was but the opinion or conclusion of the witness from such acts or words.

3. Champion Butler was incompetent to testify to the general character of Smedley.—1 Green. Ev. § 461; Douglass v. Toucey, 3 Wend. 352; 2 Stark. Ev. 146; 3 S. & R. 336; Hadjo v. Gooden, 15 Ala. 718.

4. The evidence of Sophia Riley was improperly admitted. 1 Green. Ev. 461; 2 Stark. Ev. 146; 3 S. & R. 336; 15 Ala. 718.

JOSEPH R. JOHN and WM. M. MURPHY, *contra:*

No action can be maintained against the defendant, upon the facts shown by the record, until he has been prosecuted. Morgan v. Rhodes, 1 Stew. 70; McGrew v. Cato, Minor's R. 8; Middleton v. Holmes, 3 Porter 424; Blackburn v. Minter, 22 Ala. 614; 6 B. & C. 551; 1 Hale's P. C. 546.—The case of Beasley v. Mitchell, 9 Ala. 780, does not conflict with the cases above cited, as it only decides the law as to innocent purchasers. The rule could not operate in that case, as the defendant was guilty of no offence, and there could be no compounding of a felony between them.

CHILTON, C. J.—Whether, if the question were an open one, or for the first time before this court, we should be disposed to hold that an action to recover stolen property might

not be maintained against the thief before instituting a criminal prosecution for the felony against him, is not now a matter of inquiry with us; but shall we depart from an unbroken current of decisions, extending back to the first organization of the court, is the question presented by the able argument of the counsel for the appellant.

If, as he insists, these decisions are opposed to the constitution of the State, or of the United States, then it would be our duty, as well as our pleasure, to overrule them. But we do not so regard them.

It is insisted, that to deny the owner of the goods a civil remedy until he prosecutes the thief, and to deprive him of all remedy against the felon should he never institute such prosecution, is to deprive him of his property without due course of law, in violation of the tenth section of the first article of the constitution. But, if such was the course of the law when the constitution was formed, as it undoubtedly has always been by the common law, it certainly amounts to no violation of either the letter or spirit of this provision.—To bring the case within the constitutional inhibition, it must be shown that requiring a public prosecution for the felony, as a pre-requisite to an action to recover for the property stolen, is unlawful—not in accordance with the due or regular course of law; and this takes us to where we started—to the inquiry, is it the law?

The same answer holds good to the objection, that the principle, as several times asserted by this court, is violative of the fourteenth section of the first article of the constitution, which declares that "all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and right and justice administered, without sale, denial or delay."

The object of this provision was, not to interfere with, but to secure the regular administration of justice in every case according to the forms which the law prescribes. It does not operate, nor was it intended, to prevent those delays necessarily consequent upon the administration of justice. All courts are open, but parties must bring themselves within the law and the practice adopted in them, before they can invoke their aid in asserting remedies. The Chancery Court is open for

the investigation of frauds at the suit of creditors against their debtors, but the creditor must first reduce his demand to judgment. So, a creditor may redeem the lands of his debtor under certain circumstances, but he must wait until he gets a judgment. The endorsee has his remedy against the endorser of a promissory note, but he must come into court generally with a judgment and return of *nulla bona* against the maker, or the door of the court is forever closed against him. No one would contend that these laws, affixing conditions precedent to a right of recovery, were opposed to this clause in the fundamental law. Just so, with regard to the law before us. Public policy, and a just regard to the interest of the whole community, demand that felons should be brought to punishment, and should not be permitted to go at large, and plunder and prey upon the community at pleasure. In cases of larceny, no one is better calculated to become the prosecutor than the party whose goods have been feloniously taken and carried away. He is presumed to be more cognizant of the facts than any one else, and is therefore better prepared to conduct the prosecution to a successful termination. It is the duty of every good citizen, in consideration of the protection which he himself receives by the strong arm of the law, to see that offenders do not go unpunished, and to prosecute them for violations of the criminal code; and we see no reason why the law may not, in cases of this character, superadd the strong motive of self-interest, as an additional inducement to such prosecutions. Aside from such inducement, the temptation to compound felonies, or, at least, to let offenders pass unpunished, would be so great as, in many cases, to suppress prosecutions. To withhold such temptation, and as a stimulus to prosecute the offender, were among the reasons which lie at the foundation of the rule as it obtained at the common law—reasons which operate as strongly now as they did upon our common-law ancestors; and although other reasons, founded upon the forfeiture of the felon's goods to the crown, were then superadded, which do not now obtain with us, yet the rule, although it works in many cases an apparent hardship, is not without considerations of sound public policy to sustain it. At all events, it is firmly established by numerous decisions of this court, to overrule which would fur-

nish a precedent for unsettling the law far more injurious in its consequences than the rule itself.—McGrew v. Cato's Ex'rs, Minor's R. 8; Morgan v. Rhodes, 1 Stew. 70; Holmes v. Middleton, 3 Porter 427; Minter v. Blackburn, 22 Ala. 613.

A rule that has become settled law, is binding upon the courts, and is to be followed.—1 W. Bl. R. 181; 1 Eden 250; 7 Bing. 279; 3 Ves. 529; 7 *ib.* 199; Ram on Judgt. 33, and cases cited. The case of Beasley v. Mitchell, 9 Ala. 780, was a correct decision, and is not opposed to the previous adjudications of this court, although, in delivering the opinion, the judge uses general language, which, if applied to any other than the facts presented by that case, might be calculated to mislead. That was a suit against a third party, who innocently acquired the goods. Here the action is against the alleged thief. Bearing in mind this distinction, there is no incongruity between that case and this.

The plaintiff having introduced proof tending to show that the defendant and Blake were quite intimate, friendly, and acting in concert, it was competent for the defendant to prove that such intimacy or friendly relations did not exist. The proof, therefore, made by Mrs. Butler, at whose house Blake boarded at the time of the alleged intimacy, was strictly rebutting. Nor is it objectionable as stating a conclusion of the witness. She says, "he manifested great hostility to the defendant Martin." The plaintiff had proved one condition of the mind, viz., that defendant and Blake were friendly; this is proof of the opposite *status*, and if the plaintiff had desired the witness to be more specific as to the manner in which the alleged hostility was manifested, he should have propounded suitable interrogatories eliciting such explanation.

As to the testimony of Champion Butler, we need only remark, that he was not a witness sent into the neighborhood by the party introducing him to learn the general character of the witness Smedley. He removed into the neighborhood where Smedley had lived, as we may infer from the bill of exceptions, about the time Smedley left it, and it was competent for him to prove the general character of the witness at the time the latter left. Suppose Smedley had resided a great length of time, say forty years, in the neighborhood to which Butler removed, and during all that time had enjoyed a most

unblemished reputation for truth and veracity; would it not have been competent for the party introducing him to prove this, to rebut evidence of bad character in a neighborhood to which he had recently removed, and where he had resided for only a short time? It clearly would. The proof here offered is but the assertion of the same principle differently applied.

The bill of exceptions fails to show any error in the admission of the testimony of the witness Riley. It does not appear that she had deposed to anything except Smedley's general character, and the answer objected to is, "I state what I have said about Joseph Smedley's general character, both from my own knowledge, and what I have heard from other persons," &c. In Hadjo v. Goodwin, 13 Ala. R. 718, it was held, that a witness may depose to the general character of another, if he swears he is acquainted with it in the neighborhood in which he lives, although he has never heard any of the neighbors speak of his character for truth. This assumes, what was here conceded, that a witness may have personal knowledge of the general character of another, aside from what he has heard others say about such character; and the witness may well speak from such personal knowledge of general character, not, however, from personal knowledge of the witness' unworthiness aside from his general reputation or character. That the general character for truth and veracity of Smedley was "very unfavorable," is, in common parlance, but another mode of saying that it was bad in that regard, and in our opinion is unobjectionable.

Having examined all the points raised by the assignment of errors, we are unable to perceive that the court mistook the law in any particular. The judgment must therefore be affirmed.

CRABB'S ADMINISTRATOR *vs.* THOMAS.

1. A separate estate in slaves may be created by a verbal gift to a married woman consummated by delivery; and the donor cannot, by deed subsequently made without the consent of the donee, and while the latter is in possession, alter the terms of the gift.
2. A married woman, whose separate estate is levied on by her donor's creditors, and who has no trustee to protect her interest at law, may come into equity for relief.
3. Where the bill alleges a gift of slaves to complainant "*to her separate use for life, with remainder to her children*," while the proof shows a gift "*to her and the heirs of her body*, free from the control of her husband," the variance between the *allegata* and *probata* is fatal.
4. A case will not be remanded that the bill may be amended, when the amendment would make a different case from that stated in the bill.

APPEAL from the Chancery Court of Tuskaloosa.
HEARD before the Hon. E. D. TOWNES.

THIS bill was filed by Mrs. Elvira Thomas, suing by her next friend, to protect her separate estate in certain slaves from the judgment creditors of her father, from whom she derived them. The facts are all set out at length in the opinion of the court.

E. W. PECK, for the appellant:

1. The common law does not allow a married woman to possess personal property independently of her husband; yet a trust for her sole benefit may be created, which a court of equity will see strictly performed.—Clancy's Rights of Mar. W., b. 3, c. 1, p. 251.

2. An estate to the separate use of a married woman can only be created by deed or will, or, at the least, by an instrument in writing. The exceptions to this rule (if it be proper to call them exceptions) are where the subject-matter of the estate is of a paraphernal character.—*Ib.*, pp. 92, 262.

3. Although equity so qualifies the common law, as to permit a *feme covert* to take and enjoy personal property to her separate use, when given to her with that intent, yet such intent must be very distinctly expressed, before the court will permit it to prevail against the rights of the husband. The

instrument by which such gift is made must clearly speak the donor's intention.—Clancy 262; Palmer v. Trevor, 1 Vern. 261-2; Tyrrel v. Hope, 2 Atk. 558; Pollard *et al.* v. Merrill & Eximer, 15 Ala. 169, 173; Hale v. Stone, 14 *ib.* 803, 810; Mitchell v. Gates, at this term. An estate in remainder in personal property cannot be created by parol.—2 Kent Com. 351, and note b.

4. If such an estate may be created without deed, will, or writing, the evidence in this case is insufficient for that purpose. The witness does not pretend to remember the words employed by the donor, but says, she has used his language as near as she could recollect it.

5. The case made by the proof is not the case stated in the bill; and for this reason the decree cannot be sustained.—Clements v. Kellogg, 1 Ala. 331, 333; Lyon v. Goodwin, 4 Por. 297.

6. The case made by the proof does not show a separate estate in the wife. The witness says, "the gift was made to Mrs. Thomas, free from the control of her said husband." This, if it was in fact the language actually employed by the donor, would not create a separate estate in the donee. Mr. Bright, in his work on Husband and Wife, says, the words "to be under her sole control" do not create a separate estate.—Vol. 2, 208.

7. The pretended gift set up in the bill is void by the statute of frauds; the possession was not really and *bona fide* with the pretended donee; it was in fact with the husband. Clay's Dig. 255, § 2.

ORMOND & NICOLSON, *contra:*

The only question which arises upon the record is, whether a separate estate in personal property can be created by a verbal gift. There seems to be no authority bearing directly upon the point, either in this country or in England, and the question must be solved upon principle alone. All contracts or agreements, at common law, were divided into specialties and parol agreements, the latter including all contracts not under seal. No instrument in writing was required for the sale of personal property. It is not necessary to the validity of the sale of a negro now, that there should be any written

conveyance. If, then, the title to a slave may be conveyed by verbal gift, why may it not be given to a particular person, and for a special purpose? The only reason why such gifts are usually in writing, is, that the evidence thereof is the more readily perpetuated. For if, as in Tyrrill v. Hope, 2 Atk. 558, a separate estate was established in the wife, upon a mere memorandum in writing not under seal, why may it not be by verbal gift, if it does not invade the provision of the statute of frauds? But the statute of frauds can have no influence upon this case, as the property was dedicated to the daughter by her father long anterior to the existence of any debt to complainant's intestate. The only difficulty, then, is in the proof, and not in the principle involved. Before the passage of the statute of frauds, a trust could be created by parol declaration, if the property could be so conveyed.—Hill on Trustees 56; Kirkpatrick v. Davidson, 2 Kelly 297, and authorities there cited. In McQueen on Hus. and Wife, 2d part (66 Law Lib.), 292, the question whether a separate estate can be created by parol testimony is touched upon, and the author expresses it as his opinion that it may be done.

LIGON, J.—This bill is filed by a married woman, through her next friend, to protect her separate estate from the creditors of her father, from whom she derived it. It alleges, that in 1830, Charles Lewin, the father of the complainant, some time after her marriage, gave her a negro woman named Martha, who has since become the mother of a boy named Henry; that the woman was delivered to her at the time of the gift, and has been constantly in her possession since that time; that the boy was born while his mother was thus held by her, and is still in her possession; that the donor gave her the slave to her own separate use for life, with remainder to her children; that she has no trustee, and that the gift was never reduced to writing. It is further alleged, that several years after this gift the donor became embarrassed in his pecuniary circumstances, and among others made a debt to George W. Crabb, on which judgment has been obtained, and an execution issued on it has been levied on the slaves above named; that after this debt was contracted, the donor made a deed to one Dennis Dent, without complainant's

knowledge or consent, by which the slaves were conveyed to him in trust to the separate use of complainant during her life, with remainder to her children; that she has three children. The complainant sets up no claim under the deed to Dent, but insists that her right was perfect under the oral gift, and that she should not be prejudiced by any subsequent disposition of the property by the donor, made without her consent. The prayer of the bill is for an injunction and for general relief. To this bill there was an answer and a demurrer. The chancellor overruled the demurrer, and on the merits decreed in favor of the complainant; and his decree is now assigned for error.

It is here insisted, that the trusts and uses set up in the bill cannot be created without a writing of some kind, and, as the bill alleges none, it is without equity. By our law, the absolute property in chattels may be passed by delivery, and we can see no good reason why a less interest may not be passed in the same way. At common law, an express trust might be created without writing, when the subject of the trust could be passed without an instrument in writing.—Hill on Trustees 56; Gilbert on Uses 270-271; Dowman's Case, 9 (Coke's) Rep. 10; Porter *et al.* v. Bank of Rutland *et al.*, 19 Verm. 410. Thus, it is said, a trust may be created in lands *by words only*, when it is accompanied by feoffment, or by livery of seizin; or in a chattel, if declared by word at the time of the delivery. Hill on Trustees, *supra*. We have repeatedly held, that the declarations of the donor, accompanying the gift, and made at the time of the delivery of the chattel, may be proved to show what interest was intended to be passed to the donee.—Olds v. Powell, 7 Ala. 662; 9 *ib.* 861; Gunn v. Barrow, 17 *ib.* 743. In all these cases, the proof thus admitted was received to establish a separate estate in the wife, at the time of the gift of slaves by the father to the daughter, who was a married woman at the time of the gift; and to rebut the presumption of an absolute estate in the husband arising from his possession of the slaves before the terms of the gift had been reduced to writing.

From these cases, with others which may be cited from our own decisions, we conclude, that in gifts of slaves to married women, it is competent to limit the interest they take, and

define the extent of their title, without any writing. Nor would the donor be allowed, by his deed subsequently made, without the consent of the donee, who is in possession of the property, to alter the terms, or change the interest which passed to her on the delivery of the slaves. He parts with all dominion over the property when the oral gift is perfected by delivery, and has no greater right to convey it away, than a stranger to the title would have. If he makes a deed to the donee, or a trustee for her, conforming to the terms of the gift, this deed will not be regarded in equity as the *origin* of her right to her life use of the property; *that* will be referred to the time of the oral gift, if it becomes necessary to do so to protect her interest. The deed in this case to Dent, as trustee for Mrs. Thomas, although it may conform in its statements of the trust to her, with remainder to her children, to the terms of the oral gift, as they are set out in the bill, still is not the origin of her right; this must be held to have arisen in 1830, the time when the oral gift was made. The bill alleges, that at this time Charles Lewin, the donor, was unembarrassed, and that the debt of Crabb arose long afterwards.

The whole case made by the bill shows the right of Mrs. Thomas to the slaves in controversy; the danger to that right arising from the conduct of the appellant in levying upon the property of the appellee, to satisfy a debt which is no charge upon it, either at law or in equity; and that, being a married woman, without a trustee to hold the legal estate for her, she is without remedy at law. The bill is a good one, and the demurrer to it was correctly overruled.

We do not, however, think the final decree can be sustained on the proof found in this record. It is a settled and invariable rule in equity, as well as at law, that the *allegata et probata* must substantially correspond. This is not the case on this record. The bill charges, that the slaves Martha and her increase were given to Mrs. Thomas "*to her separate use for life, with remainder to her children*"; while the proof is, that she was given to "Mrs. Thomas *and the heirs of her body, free from the control of her husband.*" The legal effect of this gift excludes any remainder to the children. The words used are such as were formerly employed to pass an estate

tail, and under our law now pass the entire interest to the first taker; so that, instead of vesting a use for life in the appellee, she takes the absolute property, discharged from the marital rights of her husband. The words "free from the control of her husband" are effectual to show that the donor did not intend the husband to take any interest in the property. The law does not require any set form of words to create a separate estate in the wife; if any are used which show a clear intention to exclude the marital rights of the husband, the courts will give them effect.—Williams v. Maull, 20 Ala. 721; Pollard v. Merrill, 15 *ib.* 169, and authorities there cited.

The title made by the bill, and that shown by the proof, are essentially different, and for this reason the decree must be reversed.

We would remand the case, that the bill might be amended in the court below, but the amendment required in order to adapt the bill to the proof would make a different case from that set out in the original bill, and for this reason would not be allowable.—Irvine v. McKinley, 13 Ala. 681, and authorities there cited. It may not be amiss to say, that in either the case made by the bill, or that shown by the proof, the appellant, who became a creditor of the donor after the gift to Mrs. Thomas was perfected by delivery, will not be allowed to charge the slaves with its payment.

Let the decree be reversed, and the bill dismissed without prejudice, at the cost of the next friend of the appellee.

ROWLAND'S ADM'RS *vs.* SHELTON.

1. The measure of damages for a breach of a warranty of title to a slave, which is afterwards recovered from the vendee in a suit of which the vendor had notice, is the value of the slave at the time of his purchase, with interest thereon, and the cost necessarily incurred by him in the suit brought against him to test the title, with interest thereon from the time of its payment.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. ANDREW B. MOORE.

THIS was an action of COVENANT by Clough L. Shelton against R. D. Rowland's administrators, to recover damages for the breach of an express warranty of title to a slave, which was sold by said Rowland to Shelton, and was afterwards recovered from the latter, in an action of detinue, brought by one Rutledge, who claimed and recovered under title paramount to that of Rowland; of which action Rowland had notice. The court charged the jury, "that the measure of damages in this case was not the value of the slave at the time of plaintiff's purchase from defendants' intestate, superadded to the costs of the suit of Rutledge against the plaintiff, and interest thereon"; but "that plaintiff was entitled to recover the value of the negro as assessed in that suit, and the following costs of suit, viz., the attorney's tax-fee and the county tax, and nothing more." To this charge the defendants excepted, and they now assign it for error.

JAS. B. MARTIN, for the appellants:

The measure of damages in cases of this character, is the purchase money, interest thereon, and the costs of the suit by which the vendee was evicted, as the following authorities show: Staats v. Ten Eyck's Ex'rs, 3 Caine's Cas. 111; Baldwin v. Munn, 2 Wend. 399; Pitcher v. Livingston, 4 Johns. 1; Smith v. Strong, 14 Pick. 128; Nichols v. Walters, 8 Mass. 243; Williams v. Beeman, 2 Dev. 483. The same rule applies in the sale of personal property.—Sheppard v. Hampton, 3 Wheat. 200; Shannon v. Comstock, 1 Brock. 212; Badgett v. Broughton, 1 Kelly 591; Milton v. Rowland, 11 Ala. 732; Marshall v. Wood, 16 *ib.* 806; 5 Wend. 535; 1 Johns. 517; Willis v. Dudley, 10 Ala. 933; Warner v. Hatfield, 4 Blackf. 394. The judgment in the suit of Rutledge against Shelton, was no evidence of the damages in this case; that was an action of detinue, in which the courts encourage high valuations of property, for the purpose of securing its return in specie, which is the object of that suit; such assessments are no criterion of real value.

WHITE & PARSONS, *contra:*

The cases in which the value of the thing sold at the time of sale, with interest thereon, has been held the criterion of damages, in actions of this kind, are for breach of warranty of soundness, and not of title.—Willis v. Dudley, 10 Ala. 935; Milton v. Rowland, 11 *ib.* 732. The general rule of law is, that when the law gives a remedy, it shall be commensurate with the injury sustained.—Willis v. Dudley, *supra.* It is manifest that the injury sustained in this case is the value of the negro at the time of the recovery by title paramount to that of the vendor. The warranty was, that the title was good; it was broken; shall the person who relied upon its *bona fides* and validity suffer wrong by so doing, or shall the warrantor be compelled to make good his warranty by indemnifying his vendee against whatever loss he may have sustained? The value at the time of sale, with interest, is oftentimes not a compensation or indemnity, and the vendee is made to suffer, not for laches or wrong on his part, but for relying on his vendor's statements. That the measure of damages, upon a breach of warranty of title, is the value at the time of eviction, see Gore v. Brazier, 3 Mass. 523; Caswell v. Wendell, 4 *ib.* 108; Bigelow v. Jones, *ib.* 523; Chapel v. Bull, 17 *ib.* 213; Sweet v. Patrick, 3 Fair. 1; Sterling v. Peet, 14 Conn. 245; Park v. Bates, 12 Verm. 381; Bissell v. Erwin, 13 La. 143; Mills v. Bell, 3 Call's R.

GOLDTHWAITE, J.—The only question raised upon the briefs of the counsel in the present case, is, as to the measure of damages on a breach of the warranty of title of a slave. The rule is well established, that if one contracts with another for the delivery of goods at a particular day, to be then paid for, the measure of damages is the value of the goods at that time.—Sheppard v. Hampton, 3 Wheat. 200; Day v. Dox, 9 Wend. 129; Shaw v. Nodd, 8 Pick. 9. So, in an action against the vendee, for refusing to accept goods, agreed to be purchased at a specific price, the measure of damages is the difference between the price agreed to be paid and the actual value of the goods at the time they should have been accepted. Davis v. Adams, 18 Ala. 264. If, therefore, one was to agree to sell and deliver a slave with a warranty of title, on a day

certain, to be then paid for, and was to fail to comply with his engagement, the value of the slave at the time he was to have been delivered, with interest to the judgment, would be the measure of damages. Regarding the breach of the warranty as simultaneous with its execution, there is no difference in principle between the cases we have cited and the case under consideration. But without reference to these decisions, the rule in this court, as to a warranty of soundness, is, that where a slave from disease is worth nothing, the purchaser is entitled to recover the actual value of the slave at the time of the purchase, with interest and such other damages as naturally flow from the breach of the warranty, such as expenses for medical attendance, (Hogan v. Thorington, 8 Por. 428; Kornegay v. White, 10 Ala. 255; Willis v. Dudley, *ib.* 933; Marshall v. Wood, 16 *ib.* 807; Worthy v. Patterson, 20 *ib.* 172); and if the rule established by these cases is correct, no good reason can exist, why it should not apply to a warranty of title. It commends itself to us very strongly from its simplicity, and meets the ends of justice, we think, better than any other general rule which could be adopted. Applying the rule to the case before us, there is no difficulty. The plaintiff below was entitled to recover the value of the slave at the time of the purchase, with interest, and he was also entitled to recover the cost which he *necessarily* incurred in the suit brought against him to test the title (Armstrong v. Percy, 5 Wend. 535), with interest from the payment; these costs being regarded as the natural consequence of the breach of the warranty, and thus falling within the influence of the principle of Hogan v. Thorington, *supra.*

Judgment reversed, and cause remanded.

CROSBY *vs.* HAWTHORN.

1. In proceedings had before a justice of the peace, preliminary to the issue of a warrant for a public offence, technical accuracy is not required: it is sufficient, if, giving to the language employed its usual and ordinary signification, it shows that an offence against the criminal law has been committed.
2. An affidavit charging the affiant's belief that the defendant "*was about to persuade, and trying to persuade, two of his* (affiant's) *hired slaves to leave his premises*," though informal, is substantially sufficient to justify a warrant against the defendant under the statute (Clay's Dig. p. 419, § 15,) forbidding any person to "*aid* any negro or other slave to run away or depart from his master's service." (Goldthwaite, J., *dissenting*.)
3. Although penal statutes are to be strictly construed, and cannot be extended by construction, yet they are not to be construed so strictly as to defeat the obvious intention of the Legislature.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. ANDREW B. MOORE.

TRESPASS VI ET ARMIS by Dennis Crosby, an infant suing by his next friend, against James A. Hawthorn, to recover damages for an assault and battery and illegal imprisonment. The defendant pleaded not guilty, and also justified under a warrant issued by a justice of the peace for the plaintiff's arrest; this warrant was issued on the affidavit of the said Hawthorn, charging "that he had good reason to believe, and did believe, that one Dennis Crosby was about to persuade, and was trying to persuade, two of his hired negroes to leave his premises." A demurrer to this plea of justification was overruled by the court, and this is now assigned for error.

WATTS, JUDGE & JACKSON, for the appellant, cited Duckworth v. Johnston, 7 Ala. 578, on the authority of which, they stated, they had brought trespass and not case.

GEO. W. STONE, *contra*:

1. The affidavit and warrant in this case charge Crosby with an attempt to commit the offence denounced in Clay's Dig. 419, § 15.

2. Every attempt to commit a felony, or even a misdemeanor, is itself a misdemeanor; and the offence is the same,

whether the felony or misdemeanor be created by statute or exist at common law.—Rex v. Higgins, 2 East 5; Rex v. Phillips, 6 *ib.* 464; 1 Russ. on Crimes, 46-7; Rex v. Harris, 6 Car. & P. 129, (25 Eng. Com. Law 315); Rex v. Butler, 6 *ib.* 368, (25 E. C. L. 441); Rex v. Roderick, 7 *ib.* 795, (32 Eng. C. L. 741); Commonwealth v. Harrington, 3 Pick. 27; 7 Conn. 266; 14 Ala. 603.

3. The pleas in this case show that the trespasses charged in the declaration consist alone in the arrest of appellant on a warrant which charged an indictable offence. In such case, if the injury be done, case, not trespass, is the remedy.

CHILTON, C. J.—The appellant sued the defendant, Hawthorn, for an assault and battery, and false imprisonment. The defendant pleaded the general issue, and two special pleas, which are substantially the same, and in which he avers that the injury complained of consists in the arrest of the plaintiff under and by virtue of a warrant issued by a justice of the peace, on the affidavit of the defendant, that he had just reason to believe, and did believe, that the said plaintiff "was about to persuade, and trying to persuade, two of his (defendant's) hired negroes to leave the said Hawthorn's premises." The pleas contain the usual specific averments, as to the identity of the supposed trespasses, and that no other or further force was employed, than such as was necessary to arrest and bring the said plaintiff before the justice for examination, touching the offence set forth in the affidavit. These special pleas were demurred to, and the court held them good. The overruling of the demurrers presents the sufficiency of the pleas as the only question for our consideration.

It is argued for the appellant, that the action of trespass may well be sustained for this arrest, because the proceeding before the justice was not for any offence known to the criminal law of the State, and was consequently *coram non judice*, and void. On the other hand, it is insisted that the affidavit *substantially* states that the plaintiff *attempted* to commit either a felony or misdemeanor, and that such attempt is itself an indictable offence, whether the felony or misdemeanor be created by statute or exists at common law.

The statute which it is alleged the affidavit shows an attempt to violate, reads as follows: "Any person who shall knowingly aid any negro or other slave to run away or depart from his master's service, such person, so offending, on conviction, shall suffer imprisonment in the penitentiary, not less than two, and not exceeding five years."—Clay's Dig. 419, § 15.

In preliminary proceedings of this nature, which are usually had before justices of the peace, technical accuracy cannot be expected, and is not required. It is sufficient, if, giving to the language employed its ordinary signification, the court may gather from it, that an offence against the criminal law has been committed or attempted. If such proceedings were to be subjected to the rigid rules of criticism, and all the constituent elements of the offence sought to be investigated, were required to be set forth in the affidavit or warrant with certainty, the administration of the criminal law would be greatly embarrassed, and offenders would often go unpunished, by reason of the hazard which the justice who issues, the party who procures, and the officer who executes the process for arresting them, would incur. We must be content to gather the meaning of the party from the affidavit, and disregard the want of technical accuracy of description. Bennett v. Black, 1 Stew. 39; 5 S. & P. 367; Ewing v. Sanford, 19 Ala. 605. Thus construed, we are of opinion that the affidavit, or information, was substantially sufficient to justify the warrant. To persuade the slave to leave, is "to aid him to depart;" for, by the term "aid," is comprehended all those appliances which may be resorted to as means to induce or assist a slave in running away. And, although persuading him to leave his master's *premises* is not technically the same as inducing him to quit his *service*, as he may leave his premises and still remain in his service, yet, as the expression is understood in common parlance, we understand it to mean, that Crosby was trying to persuade the slave to throw off the master's dominion and authority, by abandoning his premises, thus "departing from his service." This description of the offence, we concede, would be insufficient in an indictment; but, in respect to such preliminary proceedings, as we have said, a greater latitude of construction

is allowed. The warrant not being void, the case of Duckworth v. Johnson, 7 Ala. 578, has no application.

That the attempt to commit a felony is an indictable offence, although the felony is not committed, is too well settled by the authorities to require argument; and the more modern cases concur in holding, that the soliciting or persuading another to commit a felony, nay, even a misdemeanor, is itself a misdemeanor.—See the cases collated in The King v. Higgins, 2 East 5; see, also, The King v. Phillips, 6 East 464, where it was held a misdemeanor to endeavor to provoke another to send a challenge to fight. In The Commonwealth v. Reuben Harrington, 3 Pick. 26, it was held, that letting a house to a woman of ill fame, knowing her to be such, with the intent that it should be used for purposes of prostitution, was an indictable offence at common law; and the doctrine was there asserted, that inciting, encouraging, and aiding a person to commit a misdemeanor, is itself a misdemeanor.—See, also, cases cited on the brief of appellee's counsel.

Upon the whole, we are of opinion that the warrant was not void, but the arrest was under valid process; and the action of trespass does not lie for the injury, conceding, as the demurrer does, the truth of the pleas.

It follows that the court committed no error in overruling the demurrers, and the judgment is consequently affirmed.

GOLDTHWAITE, J.—My opinion is, that the word "aid" in the statute (Clay's Dig. 419, § 16) is not used technically, but as the synonyme of "assist"; and that under the strict rules of construction applicable to penal statutes, we are not authorized to extend the meaning of the words beyond their ordinary and usual signification, in order to reach what we suppose to be the mischief of the statute. The term "aid," or "assistance," is, in its common acceptation, very different from "persuasion"; and although statutes against assisting prisoners to escape are found in England, as well as almost every State in the Union, we have been cited to no case, and have not been able to find any, in which persuasion has been held to be assistance within the meaning of these statutes. A convincing argument, to my mind, that the Legislature did not intend to use it in that sense, is, that in the next section

of the statute the offence of inducing a slave to leave the service of his master by persuasion merely, is stated and defined. The penal code is to be taken as a whole; and when it makes express provision in one part for the punishment of those who persuade a slave to leave with a certain intent, it is scarcely possible to escape the conclusion, that, had it been intended to include this act under the preceding section, the same or equivalent words would have been employed. It is better, in such cases, to stand upon the plain words of the statute, and to confine and limit the offence within the natural meaning of the words used, rather than, by forcing the language, to run the risk of creating by judicial construction an offence which the Legislature may never have contemplated.

Entertaining these views, I agree, that, in proceedings had before a justice of the peace, preliminary to the issue of a warrant for a public offence, technical accuracy is not required, and that it is enough if, giving to the language employed its usual and ordinary signification, it appears that an offence has been committed; but I do not agree that the words used would fairly imply the commission of the offence contemplated by the statute.

CHILTON, C. J.—The majority of the court readily concede that penal statutes are to be strictly construed, and cannot be extended by construction; for the law does not allow of constructive offences, or of arbitrary punishment. Hence the act which subjects a man to a punishment, must be within the letter and spirit of the statute which imposes the penalty.—Smith's Com. 861. But, although penal statutes are to be construed strictly, in the language of Marshall, C. J., in The United States v. Wilterberger, 5 Wheat. 76, "they are not to be construed so strictly as to defeat the obvious intent of the Legislature." This intention, he adds, "is to be collected from the words they (the Legislature) use."—See, also, 2 Peters 358; 2 Mass. 144; Paine's R. 209. A few examples from adjudged cases may serve to illustrate this position:

In the United States v. Morris, 14 Peters 464, by an act of Congress, (10th May, 1800,) it was made an indictable offence for any citizen of this country to serve on board of

any vessel of the U. States, "employed or made use of in the transportation or carrying of slaves from one foreign place, or country, to another," &c.; and the defendant was indicted under the act. The question came up, whether a vessel on her outward passage to the coast of Africa, for the purpose of taking in a cargo of slaves, was "employed or made use of," within the contemplation of the statute, before any slaves were received on board. The court, Taney, C. J., delivering the opinion, held that, while penal statutes must be construed strictly, "yet the evident intention of the Legislature ought not to be defeated by an over strict construction": that to be employed in any thing, meant not only the act of doing it, but also to be engaged to do it,—to be under contract or orders to do it; and the court concluded "that the voluntary service of an American citizen, on board a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in transporting or carrying slaves from one foreign country to another, was, in itself, and where no slaves had been transported in such vessel, or received on board, an offence under the statute."

So, also, in Commonwealth v. Loring, 8 Pick. 370, the defendant was indicted under a statute, which made it an offence for any one, "not being authorized by the board of health, or the selectmen of any town, to dig up, or aid or assist in digging up any human body," &c. The indictment charged, that it was done without authority of the selectmen of the town where the body was buried; but the statute said "any town". Considered without reference to the subject-matter and intention of the Legislature, and construed literally, the indictment should have averred that no town in the commonwealth had given authority; but Parsons, J., while he admitted the general rule as we have stated it, said, that it did "not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the Legislature ought not to be presumed to have intended"; and he cites the authorities, to show that while penal statutes, as a general rule, are to be strictly construed, yet they are to receive such a construction as would conform to the intention of the Legislature.—Bac. Abr. Stat. 1, 9;

Heydon's case, 3 Coke 7 ; 8 Mod. 65 ; Plow. 86 ; Cro. Car. 71 ; see, also, 15 Wend. 147 ; Smith's Com. ch. 28, pp. 854 to 878, where the cases are collated.

These authorities may suffice to show, that in penal, as in all other statutes, we must not disregard the obvious meaning and intention of the Legislature ; but, when the expressions used may, without any strained interpretation, be so construed as to serve the manifest intent, it is the duty of the court so to construe them.—1 Story's Rep. 255 ; 1 Gal. 117 ; 13 John. Rep. 198.

Applying this well established principle of law to the statute before us, we deem it shorn of difficulty. It can scarcely be believed that while the general assembly, by a long course of legislation, have attempted so sedulously to guard the rights of the master over this species of property, and to protect his rightful dominion and authority over his slaves ; and while it is made a felony, which may be punished by fifty years imprisonment in the penitentiary, for any one, directly or indirectly, to persuade or induce any slave to leave his master's or mistress' service, with intent of escaping to some other country where he may enjoy his freedom, or to harbor or conceal such slave, with a knowledge of such intent to depart or escape as aforesaid ; that, while one who shall *entice* away any slave with a view of converting such slave to his own use, or the use of any other person, shall be imprisoned in the penitentiary not less than ten years, it should be no offence whatever for any one to procure by enticement or persuasion a slave to run away and throw off the dominion of his master. Such an omission would be as remarkable, as it would be, doubtless, in many instances, detrimental to the interest of the master. It would be leaving wide the door for the corrupting and disaffecting of the slave population of the State, by the vile or fanatical, with impunity, and would greatly depreciate the value, if not endanger the permanency of the institution itself. We repeat, it could hardly be conceived, how the learned gentlemen who drafted the penal code, with the Legislature who adopted it, as well as all the preceding and succeeding Legislatures, could have been guilty of such an oversight. Yet it is true that such omission exists, unless the inducing a slave to run away by persuasion or pre-

senting motives before his mind, is comprehended by the term "*aid.*" "Any person," says the statute, "who shall knowingly aid any negro or other slave to run away or depart from his master's service," &c. Aid how, I ask? By money, or provisions, or clothing? These might, in many cases, be far less potent in inducing or aiding him to escape, than the use of persuasion by language, poisoning his mind against his master, exaggerating his supposed hardships, and impelling him to throw off, if possible, his condition of servitude. Does not one more effectually aid a slave to depart from his master's service, who produces in him the determination to do so, and encourages and incites him by promises of protection and assistance to carry such intention into execution, than he who furnishes him money enough to buy a meal's victuals, to aid him in escaping from service? We think they are both guilty of aiding him in the strictest sense of the statute. A majority of the court, therefore, conclude, that one who procures a slave to run away from his master by such means as beget and strengthen the slave's determination to do so, whether it be by furnishing him money, provisions, &c., or by promises of such assistance, or protection, or, indeed, by any appliance designed and calculated to bring about the result, is guilty of aiding within the true intent and meaning of this act. To aid, is a very general term, and one less restricted would not have answered the purpose, nor met the object of the Legislature. It must be considered in its enlarged and legal sense, for in this sense alone can it subserve the legislative intent.

Having attained this conclusion, the information and warrant, which states that the plaintiff below was "trying to persuade the slave to leave his master's premises," is an informal effort to charge an attempt to commit the offence denounced by the statute. This warrant is informal, but not so wholly foreign from the scope and purview of the statutory offence, as to allow us, under the indulgence extended to such preliminary proceedings, to declare it absolutely void. Hence, the case of Duckworth v. Johnson, cited by the appellant's counsel, has no application. In that case, the court could not gather from the preliminary proceeding an intention to charge *any offence:* it was, "that the defendant had property in his hands in a fraudulent condition." Here, if we are right in

our construction of the statute, the court may readily gather the intention to charge an *attempt* to commit the offence mentioned in the statute; and, while we should not look to consequences in a plain case, yet, if we were doubtful as to the true construction of the warrant, we should lean to that which would protect the officers of the law and parties who may innocently seek to vindicate it from being trespassers, and to require the party who alleges he has been injured to adopt a form of action in which he must show malice as an essential element to his cause of action.

In view of the whole case, and after a careful investigation of it, a majority of the court, deeming the first opinion correct, adhere to it, and consequently overrule the motion for a re-hearing.

NASHVILLE & CHATTANOOGA RAILROAD CO. *vs.* PEACOCK.

1. The act of 1852 (Pamph. Acts 1851-2, p. 45) "to regulate and define the liability of railroad companies," does not conflict with the act of 1850 (Pamph. Acts 1849-50, p. 171) granting the right of way through Jackson county to the Nashville and Chattanooga Railroad Company.
2. To entitle the plaintiff to a recovery against a railroad company under the act of 1852, it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by the defendant's cars or locomotives.
3. Whether any degree of care and diligence on the part of the defendant will excuse it, *quære?*
4. That the cattle were killed while roaming on lands which did not belong to their owner, is no defence to the action, as the doctrine of the common law in relation to *damage feasant* has never been adopted in this State.

APPEAL from the Circuit Court of Jackson.
Tried before the Hon. THOS. A. WALKER.

ROBINSON & COWAN, and N. HARRIS, for the appellant.
BELSER & RICE, *contra.*

LIGON, J.—The proceedings in this case were commenced by the appellee against the appellants, before a justice of the peace, under the act "to regulate and define the liability of railroad companies," approved February 10th, 1852 (Sess. Acts 1851-2, pp. 45-6.) The justice of the peace rendered judgment for the plaintiff for the sum of fifteen dollars, when the case was removed by writ of *certiorari* to the Circuit Court. In that court a trial was had on the merits, before the judge, without the intervention of a jury. The proof is set out in the bill of exceptions, and establishes that the appellee was the owner of a cow, valued at fifteen dollars, which was found dead near the railroad of the appellants, under such circumstances as leave no doubt that she was killed by a car or locomotive engine passing over her; that the railroad at this point was straight for a half-mile or more, and that the cow could have been readily seen for that distance before she was run over and killed. It was also in proof, that the whistle attached to the engine was heard to sound at or near the place. The place at which the cow was killed was not on lands of the appellee. This was all the proof, and the court rendered judgment against the railroad company, from which they have appealed to this court.

It is here contended, that the judgment is erroneous, for two reasons: 1st, the act of the 10th February, 1852, is in conflict with the rights of the company secured to it by the act of 21st January, 1850, granting the right of way through Jackson county to the Nashville and Chattanooga Railroad Company, and consequently is inoperative and void; 2d, because the cow which was killed was roaming at large, and was killed on lands which did not belong to her owner.

1. The act of 1850 (Sess. Acts 1849-50, p. 171) which grants the right of way through Jackson county, in this State, to the Nashville and Chattanooga Railroad Company, contains no provision which deprives the Legislature of the power to pass laws in respect to the liability of the company for trespasses committed by its agents on the property of citizens of this State, within its borders, or of prescribing the form of proceeding, and the remedies for such trespasses. That corporation has no greater rights than similar ones created by the Legislature of this State, and exercising their functions solely

within its borders; and we are not advised that the power to prescribe remedies against such bodies, for the wrongful acts of their agents, has ever been yielded by the State in any charter which it has granted. It is clear that the provisions of the act of the 10th February, 1852, were intended to apply as well to this company as to any of our domestic corporations of the same character, and we can take no distinction between them.

The first section of the act of 1852 provides, "that whenever any live stock, or cattle of any description, shall be killed or injured by the cars or locomotives of any railroad in this State, the corporation owning such railroad shall be liable to pay the owner or owners the value thereof if killed, or the damage thereto if injured." The act then prescribes the form of the remedy against the company, which, it appears, was strictly pursued in this case. Under this act, all that is necessary to make out the case for the plaintiff, is to show property in the stock or cattle killed, their value, and that they were killed by the cars or locomotives of the defendant. If there are any circumstances which tend to show that the killing was the result of accident, which could not have been controlled by the company by the exercise of the greatest degree of diligence and care on the part of their agents, this may be shown in defence; and if this is not satisfactorily done, the plaintiff is entitled to recover. There is nothing in this bill of exceptions which shows that any care or diligence was used by the agents of the company to prevent the happening of the act which constitutes the trespass complained of. It is true, the bill of exceptions states that the whistle of the engine was heard to sound near the place at which the cow was killed; but whether at the time of the killing, or at some other, we are wholly uninformed. We apprehend, however, that the mere sounding of the whistle, without more, would not be sufficient to exempt the company from liability for the trespass, under the statute. As to the degree of care and diligence on the part of the company, or whether any will excuse them under the statute, we do not now decide.

2. It is strenuously contended, that as the killing was not done on the premises of the owner, but while the cow was roaming at large on the lands of others, that the company

should not be held liable for the trespass. To sustain this objection, the doctrine of the common law, in respect to trespasses by and upon cattle, is invoked by the counsel for the company. The common law, in this respect, has never been adopted in this State. The laws of Mississippi Territory, which were adopted by the State of Alabama at the formation of our State constitution, contain provisions in direct repugnance to the common law on this subject, and to the extent of this repugnance repealed it.—Toulmin's Digest 723-4, 362. Our present Code contains similar provisions, which show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen. Upon no other principle can we account for our stray laws, found in sections 1062 and 1063 of the Code, and the stringent laws in relation to trespasses on stock or cattle in sections 1100 and 1101.

In every view we are able to take of this case, we think the conclusion of the court below is correct, and its judgment must be affirmed.

ALABAMA & TENNESSEE RIVER RAILROAD COMPANY *vs.* HARRIS.

1. A suit commenced by a corporation, without first giving security for the costs, as required by section 2398 of the Code, will be dismissed on motion.
2. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398 of the Code; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. A. B. MOORE.

THE appellant issued a notice against the appellee, Warren Harris, as a delinquent stockholder, under the act of 1847 (Pamphlet Acts 1847–8, p. 268). At the trial term of the notice and motion, the defendant therein moved to dismiss the

proceeding because security for the costs had not been given before the commencement of the suit; and the plaintiff also moved to be allowed to give security at that time, and to let it be given and entered *nunc pro tunc*. All these motions being heard together by consent, it was shown that, on the first day of the term, before the case was regularly called, the defendant's attorney orally moved to dismiss the case for want of security, but the court refused to hear the motion at that time; that afterwards, but before the case was regularly reached on the docket, and before the entry on the docket of the motion to dismiss, the plaintiff filed with the clerk, in open court, good and sufficient security for the costs, which was approved by him. On this evidence, the court refused to allow the security to be given, and dismissed the case; to which the plaintiff excepted, and which is now assigned for error.

James B. Martin, for the appellant:

No intelligible distinction can be drawn between the provision of the Code (§ 2398) under which this motion was made, and the old statute upon the same subject (Clay's Dig. p. 316, § 26); and the latter has received a settled construction by this court adverse to the ruling of the court below.—Lyons v. Long, 6 Ala. 103; Reese v. Billing, 9 *ib.* 263; Whitaker v. Sandford, 13 *ib.* 522. The very slight difference in the phraseology of the two statutes does not imply a legislative intention to change the old law; such an intention must be evidenced by the plainest and most unequivocal language.—Brown v. Brown, 21 Wend. 315; Gaffney v. Colville, 6 Hill 574.

Every statute ought to receive such a construction as will effectuate the object for which it was passed. A thing may be within the letter of a statute, and yet not within the statute, because not within its intended object.—Bacon's Abr., vol. 9, p. 246–8; 15 Johns. 358; 3 Cowen's R. 89; 16 Mass. 318; 4 Cushing's R. 314; 22 Ala. 621. The intention, and the sole intention, of the adoption of this statute, was to provide for the certain payment of the costs which might accrue; and this intention, instead of being promoted, is defeated by the construction put upon it by the court below.

The construction now contended for, is sanctioned and sus-

tained by every analogy of the law, as drawn by our own court: appeal cases from justices, claim suits under the statute, and attachments, have received the same liberal construction.—Clay's Digest, p. 314, § 9; Henderson v. Plumb, 18 Ala. 74; Appleton v. Turrentine, 19 *ib.* 706; Carter v. Prichard, 11 *ib.* 673; Clay's Digest, p. 211, § 52; Bradford v. Dawson, 2 Ala. 203; 19 *ib.* 706; Clay's Digest, p. 54, § 3; 7 Porter 486; 9 *ib.* 324; 11 Ala. 674; Reav. Dig. 98, § 45. And there is no difference, so far as the plaintiff's rights are concerned, between an imperfect or defective bond and one which is void, and therefore no bond.—Henderson v. Plumb, *supra;* Jackson v. Stanley, 2 Ala. 326. All these decisions go upon the same great principle—that the intention of the framers must be the guide in the construction of statutes.

This precise question has been passed upon by the courts of several other States, where similar statutes have received the construction for which the appellant now contends, thus most conclusively vindicating its correctness.—Cox v. Hunt, 1 Blackf. 146; Harlow v. Beckle, 1 *ib.* 215; Parks v. Goodwin, 1 Doug. (Mich.) 56; Bank of Michigan v. Jessup, 19 Wend. 10; 4 Blackf. 9. Whenever a statute has received a construction by respectable courts of other States, which is not inconsistent with the spirit and policy of our law, such construction may well be adopted.—13 Ill. 15.

But, if a different construction should be adopted here, then, it is insisted, the statute has no application to this case. This proceeding, by notice and motion, is not a suit within the sense of this section of the Code, and this court will not be liberal in extending it by construction to cases where it is evident that injustice will be done. This motion is only allowed between members of the corporation; both parties are alike interested in the money sued for, as well as the costs. Again: the security for costs is required to be lodged with the clerk in the cases to which the statute applies, because the process issues from his office; while here, the clerk could not describe the parties, nor the process, nor fix with reason the amount of the bond, when he does not see the notice until after it has been issued, served, and returned into court.

JNO. T. MORGAN and WM. B. MARTIN, *contra.*

GOLDTHWAITE, J.—By section 2398 of the Code, corporations were required, before commencing suits, to give security for the costs, to be lodged with the clerk; and on the failure so to do, it was made the duty of the court, on motion of the defendant, to dismiss the cause. Under the old law, non-residents were required to give security for the costs within sixty days after notice; and we are aware, that under the construction placed upon that statute by this court, the requisition might be complied with at any time before the case was called for trial at the term succeeding the notice.—Lyons v. Long, 6 Ala. 103; Reese v. Billing, 9 Ala. 263; Whitaker v. Sandford, 13 *ib.* 522. If the same language had been used, we might have felt ourselves bound to follow these decisions; but this is not the case. The Legislature, with the knowledge, as we must presume, of the construction which had been placed on the statute referred to, thought proper to require that, in suits brought by corporations, the security should be lodged with the clerk before the commencement of the action. The act speaks as clearly as language can speak, and declares that the suit must be dismissed if that is not done; and when the Legislature have said that this shall be done before suit, upon what principle is it that courts would be authorized to say that it might be done after the commencement of the action? Such a course would savor more of legislation than of judicial interpretation. It is better, in all such cases, to stand upon the plain words of the statute.

It is urged for the appellant, that this proceeding is not a suit within the meaning of the law. The object was, to provide effectually for all costs; and suits in which judgment is obtained on notice and motion, are as much within the intention of the law, as those commenced in the usual mode: every reason which exists as to the one, applies with the same force to the other. By the charter of the Alabama and Tennessee River Railroad Company, the notice is required to be served by the sheriff, (Acts 1847–8, 268); and regarding it as a substitute for the summons, we must hold the suit as commenced, so far as to require security for the costs, when the notice is placed in the hands of the sheriff to serve.

Judgment affirmed.

ERWIN & WILLIAMS *vs.* ERWIN.

1. As to the distinction between propositions, the acceptance of which amounts to a valid contract, and proposals to render a gratuitous kindness, which are not designed to create legal obligations on the parties.
2. A complaint (under the Code) alleged the contract sued on to be "in substance as follows: That in consideration that plaintiffs would then and there buy out the store-house and lot, situate in the town of C., then occupied by M. L. E. & Co. as a store-house, and the stock of dry goods then and there owned by them, he (the defendant) would assist them, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously"; or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business": *Held*, on demurrer being interposed, that the contract was too indefinite and uncertain to support an action.

APPEAL from the Circuit Court of Chambers.
Tried before the Hon. ROBERT DOUGHERTY.

THE complaint in this case (the suit having been commenced in February, 1853) was as follows: "The plaintiffs claim of the defendant the sum of $10,000, as damages for the breach of an agreement, entered into by him on the first day of December, A. D. 1851, in substance as follows: That if the plaintiffs would then and there buy out the store-house and lot, situate in the town of Cusseta, in the county of Chambers, and State of Alabama, then occupied by M. L. Erwin & Co. as a store-house, and the stock of dry goods then and there owned by said M. L. Erwin & Co., he, the defendant, would assist the plaintiffs, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously. Yet, although the plaintiffs did then and there comply, and have complied, with all the provisions of said agreement on their part, of all which the defendant had notice, the defendant has failed to comply with the following provisions, viz., that he would assist the plaintiffs, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously;

but, on the contrary thereof, refused so to do, although plaintiffs requested him to endorse their paper."

Two other counts were added in the complaint, one of which alleges the defendant's promise to have been, that "he would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business," and avers that "it was necessary for him to advance money to enable them to carry on the mercantile business"; while the other alleges the contract to have been, "that in consideration that the plaintiffs would buy, and did then and there agree and undertake to buy," said store-house and lot and stock of dry goods, "he, the defendant, promised and agreed that he would endorse for them in Charleston, and, if necessary, advance them money, to enable them to carry on the mercantile business."

The defendant demurred, in short by consent, to each count in the complaint, assigning, among several grounds of demurrer, the following: "Because there is no consideration to support said supposed contract"; and "because there is an utter want of certainty in the provisions of said contract, as to the extent to which defendant was to endorse plaintiffs' paper, or advance them money, and also as to the length of time for which defendant was to endorse and advance, and therefore the contract affords no measure of damages." The court sustained the demurrer to each count, and this is now assigned for error.

BELSER & RICE, with whom was D. CLOPTON, for the appellants:

1. Admissions which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced.—1 Greenl. Ev. §§ 207, 208, 204.

2. The law leans against the destruction of an instrument by reason of an uncertainty, and presumptively attaches to it those consequences and incidents which, in common sense, are appurtenant to its terms, and which the parties must have understood and intended should be attached thereto. Thus, when a written contract, or a verbal agreement, is silent as to the time of performance, the law adds the term that it

shall be executed within a reasonable time. In some cases, from the very nature of the thing to be performed, the party may have his life-time to perform it.—11 Ired. L. Rep. 181; Chitty on Cont. 107, and note (b), 625, and note 2 on p. 625; 2 Bos. & Pul. 265; Allen v. Green, 19 Ala. 39; 6 East 564; 4 Barn. & Ald. 268; 13 East 102.

3. There are two modes of making simple contracts and declaring on them: the one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promises, it is absolutely necessary that mutual valid promises, amounting to an express contract, should appear; otherwise one of the parties might claim the benefit of the promise of the other, without in return doing any act, or being liable for any loss whatever. In such a case, it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then, no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite that it should appear the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution.—Gurvin v. Cromartie, 11 Ired. L. Rep. 174, 179; Pillans & Rose v. Mierop & Hopkins, 3 Burr. 1665, 1675.

4. It is not the adequacy of the consideration, which determines the validity of the promise, but it is the doing of some thing by the party to whom the promise is made; and it is a familiar elementary principle, that such act, however trifling, constitutes a sufficient consideration. "The least spark of a consideration will be sufficient."—14 Ala. 156; 11 Ired. L. 178-9; 3 Burr. R. 1665, 1675; 4 Dallas 226; 2 Foster (N. H.) 246; 16 Maine 394, 397; 5 Pick. 384; 6 B. Mon. 430; 1 Metc. 91-2-3; 2 Cushing 151; 2 N. Hamp. 357-8; 1 Caine's R. 45; 17 Maine 372; 4 Ired. L. 257; 5 Cranch 142; 17 Conn. 511; McKeen v. Harwood, 15 Ala. 792, approving 18 Johns. 337, therein cited. "The promise and undertaking of the defendant did occasion a possibility of loss to the plain-

tiffs."—5 Pick. 384; 3 Burr. 1674, 1667, 1671-2. The act was done at the request, or on the procurement, of defendant. 3 Burr. 1671-2. Kirksey v. Kirksey, 8 Ala. 131, was decided by two judges against one, against an overwhelming current of authority, against elementary principles, and is not law.

The objection of the defendant, founded on the supposed uncertainty of his own agreement and promise, cannot shelter him from liability. The rules for construing agreements are stated in Chitty on Con. 72 to 90; *ib.* 107 and note (b); *ib.* 625 and n. 2. It must be construed most strongly against him. Mercantile contracts are to be construed according to the usage and custom of merchants; "and parol evidence may be adduced to show the understanding of the parties as to their contract,—the meaning which they attached to certain expressions used by them in the contract.—Renner v. The Bank of Columbia, 9 Wheat. 587 *et seq.;* Eaton v. Smith, 20 Pick. 150; Chitty on Con. 83. Although no amount of advances or endorsements was definitely named, yet, as the business was well known to all the parties, and in a specified place, the intention of the appellee in making the promise was, to give the appellants such an amount of aid as would enable them to carry on this known business to advantage; that is, to keep up their stock of goods as usual in such a store, in such a town, and according to the well-known custom of merchants in that town, where the parties all resided. Contracts must have a reasonable construction; the law will fix a reasonable time, or a reasonable amount, where none is specified; and what is a reasonable time, or a reasonable amount, is a question of fact for the jury under all the circumstances of the case.

The complaint in this case was framed under the Code, and in strict conformity with the forms therein prescribed. If the Code had never been adopted, a good declaration at common law would have been framed, containing all the usual explanatory and auxiliary averments, the want of which is now urged as an objection against this complaint. It was supposed that the Code rendered this mode of declaring unnecessary, and relieved the plaintiff from making the explanatory averments which were necessary at common law.

WHITE & PARSONS, *contra:*

If both parties to a contract are not bound by it, neither is.—Br. Bank at Huntsville v. Steele, 10 Ala. 915; Same v. Robinson, 5 *ib.* 623; James v. Stiggins, 13 *ib.* 830. In this case, there is not the slightest ground for the pretence that plaintiffs were under any obligation to buy the store-house and stock of goods; the contract is, "if they would do it, then defendant would endorse and advance money," &c. To make this a contract, there should be an obligation on their part to buy; so that if they failed to comply, the defendant could hold them liable for its breach. The mind can come to no other conclusion, than that this proposition is to be regarded as one for love and favor to be extended to the plaintiffs by the defendant, and it was not in contemplation of either party to bind plaintiffs to purchase the stock of goods, &c.—Br. Bank v. Steele, *supra;* see, also, Falls v. Gaither, 9 Por. 605. There is no mutual promise between these parties, and it will not be found in the pleadings.—Kirksey v. Kirksey, 8 Ala. 131; Burnett v. Bisco, 4 Johns. 234. "If A sign a writing that he will sell B a house on certain terms, it is a mere proposition, and not an agreement, unless B assents to it."—Tucker v. Wood, 12 Johns. 190; Cooke v. Oxley, 3 Term R. 654; 14 East 45; 6 Wend. 103.

The contract set up in each count of this declaration is void for uncertainty as to the time for its continuance, and the amount of money to be advanced, or of notes to be endorsed. Moreover, there is nothing to show that this contract can be satisfied by the advance of any amount, or by an endorsement for any amount, or for any number of times. This view is not answered by the assertion of the admitted principle, that where no time is fixed, the law gives a reasonable time. It is believed this rule applies only to contracts which specify not only what is to be done, but also how much, and how long. This precise question seems to be presented in the case of Moorehouse v. Colvin, 9 Eng. Law and Eq. R. 136. A mere contingent possibility, not coupled with an interest, is no subject of sale; as "all the wool one shall ever have."—Parsons on Cont. 438, and cases cited in note g. The thing sold must be specific, and capable of certain identification.—*Ib.* 439. For how much must defendant endorse, to satisfy the requi-

sitions of this contract? How much must he advance? How long must he continue these duties? Is the contract to continue for one year, or for fifty? Is defendant to advance and endorse for $1000, or for $50,000? Who can answer these questions in a legal manner? We insist, these difficulties are insurmountable, and that they are conclusive against the plaintiffs.—1 Story's Eq. Com. § 764, and cases cited in the notes.

There is no sufficient breach in either of the counts. No amount of money was requested, nor was there any amount as to endorsement requested. The request was, generally, to endorse and advance, without specifying the amount in either case.

There is no sufficient and legal averment of performance on the part of plaintiffs. It is a legal conclusion, and not a fact, to say, "yet, although the plaintiffs have complied with all the promises on their part," &c. The test is this: Can the court, on demurrer, say the facts show that plaintiffs have complied?

CHILTON, C. J.—We should carefully distinguish between propositions, the acceptance of which amounts to a valid contract, and proposals to render a gratuitous kindness, which are not designed to create legal obligations upon the parties. It may be, in many cases, difficult to discern the line which separates them; it nevertheless exists. No general rules can be laid down as applicable to all cases, which may serve as a guide in arriving at the true construction of each proposal, and the intent and meaning of the parties in making it. Each case must depend upon its own peculiar circumstances. We must look to the relative situations of the parties to the transaction, the benefit to the party proposing, or the detriment to the other party, constituting the consideration, and the form, nature, and character of the proposal, as evincing an intention to make a contract, or to confer a mere gratuity. If the parties really designed to enter into a contract, any benefit to the promisor, or detriment to the promisee, however slight, constitutes a valid consideration: so, also, if the parties make mutual promises, the same being executory, and the promise of the one forms the consideration of the other. In all such

cases, the contract is considered as based upon a valid consideration, and if otherwise capable of being enforced, it will be upheld.—Parsons on Con. 357; Com. Dig., Action on the Case, Assumpsit (B 1.)

The cases of Kirksey v. Kirksey, 8 Ala. Rep. 131, and Forward *et al.* v. Armistead, 12 *ib.* 124, are cases which may serve to illustrate the distinction between proposals which, when accepted, amount to contracts, and those which are merely gratuitous. We should be inclined to hold, that the alleged contract set up in the several counts in the declaration in this case, falls within the influence of these decisions, and should be regarded as a mere offer to render a kindness to the plaintiffs, which was not intended or regarded by any of the parties as a contract, creating a legal obligation, as it is fair to presume that, had the plaintiffs agreed to purchase the goods and the store-house and lot, as a *consideration* for the promise to endorse their paper and make advancements on the part of the defendant, they would have insisted on having something definite in return—some terms which were capable of being ascertained and enforced as against the defendant.

But we prefer resting our opinion upon the fact, that, conceding this to be a contract, it is so indefinite and uncertain as to be wholly void. The defendant was to endorse the plaintiffs' paper, and to make advancements. When, and for how much, was he to endorse, and how often? How long should the obligation to endorse rest upon him? How much money was he to advance, and when, and on what securities, were the advances to be made? The contract is silent as to all these matters. If it be answered, that he was to advance enough to enable them to carry on their mercantile business, this does not aid the matter: for the question recurs, Upon what scale is it to be carried on? The capital must bear some just proportion to the nature and size of the business to be carried on, and this is left wholly unsettled. It is clear, then, that no breach could be assigned upon it, which could be compensated by any criterion of damages to be furnished by the contract itself, and it is void for uncertainty.—See Moore v. Smith, 19 Ala. R. 774-783; 1 Chitty's Pl. 261, 232, 236-7; Chitty on Con. 72; Figs v. Cutler, 3 Stark. R. 139; Sherman v. Kitsmiller, 17 S. & R. 45.

The demurrer to the several counts in the complaint was properly sustained. No provision in the Code dispenses with the statement of such a cause of action in the complaint as may be enforced. This contract is too uncertain to avail.

Let the judgment be affirmed.

MILAM *vs.* RAGLAND.

1. On final settlement of an administrator's accounts, he was held entitled to a credit for the entire amount paid by him on a note, (which was shown to have been executed for the benefit of one K., by the intestate, said K. and himself, as joint makers,) on proof of the intestate's repeated declarations "that there were matters between him and K., in relation to the note, of which R. (the administrator) knew nothing, and which made it his (intestate's) duty to protect R." although there was also evidence of his own declarations that he had signed the note as co-surety with his intestate, and considered himself equally bound for its payment.
2. An administrator in chief, on settlement of his accounts with the succeeding administrator *de bonis non*, cannot be charged with a sum of money which is shown to have been deposited by the intestate, a short time before his death, in the hands of a bailee for safe-keeping, and to have been paid over by the bailee to the administrator *de bonis non* himself.

APPEAL from the Court of Probate of Talladega.

ON the final settlement by the appellee of his administration on the estate of James W. Milam, deceased, to which he was cited by the appellant, who succeeded him as administrator *de bonis non*, the court allowed him a credit for $849 55, and interest thereon, paid by him to the Huntsville Bank, on a note signed by said James W. Milam, one William King, and himself, as joint makers, and refused to charge him with the sum of $100, as cash on hand at the testator's death; and these rulings of the court are now assigned for error. The evidence in relation to these two items, so far as the present record differs from the previous report of the case (19 Ala. 86), is set out at sufficient length in the opinion of the court.

SAML. F. RICE and T. W. JONES, for the appellant.

JNO. T. MORGAN; *contra.*

LIGON, J.—When this case was here at a previous term (10 Ala. 618), it was held, that Ragland was entitled to retain out of the funds of the estate of Milam, in his hands as administrator, the entire sum paid by him (Ragland) on the note due to the Branch Bank at Huntsville: and when it was again here (19 Ala. 85), it was again held that he was entitled to do so.

1. It is contended, however, that the facts of the case, in relation to this item in his account as administrator, as presented by the present record, are very different from those in the records on which the decisions referred to were made, and will fully authorize a different conclusion. It is true, the testimony of the witnesses Howell and Ogletree discloses facts which do not appear to have been heretofore considered by this court. The former of these witnesses deposes, that Ragland told him, in the summer of 1845, that when the note to the Huntsville Bank was about to be made, King came to him, to get his name as surety for $1000, and that he refused; King then told him there would be no danger, as he could get another good surety on the note; Ragland asked him who it would be, when he replied, "James W. Milam": whereupon Ragland promised King, that if he (King) could get Milam, he (Ragland) would go on the note. In the conversation with the witness, Ragland stated, that he made this promise to King, because Milam had said he would not be surety for any person; but that King went off and brought back a note for $1000, with Milam's name first upon it. Ragland further said to witness, that Milam had put his name first on the note to save his (Milam's) word, or he (Ragland) supposed Milam had done it to save his word (witness could not say which of these expressions was used), and that it was a lucky thing for him (Ragland) that Milam had put his name first. Ogletree testified, that while Ragland was administrator, witness asked him if Milam's estate would be an easy one to settle; to which Ragland replied, that it would, but for the fact that Milam had unfortunately loaned his name to King for $1000 in the Huntsville Bank; that properly speak-

ing, he (Ragland) and Milam were King's sureties, and he was afraid they would have it to pay.

In our opinion, this proof does not materially change the aspect of the case from what it was when here on both occasions heretofore. The point on which it seems mainly to have turned—that is, the repeated declarations of the intestate that there were matters between him and King in relation to the note, of which Ragland knew nothing, which made it his (Milam's) duty to protect Ragland—remains unexplained by this testimony, and leaves this liability still resting upon him. Even if we regard Milam and Ragland as sureties for King, yet it is competent for one surety to make such arrangements with the principal, as will exempt his co-surety from liability to him for contribution, if he pays the whole debt, or will render him liable to such co-surety for the whole amount, if the latter should pay the debt. It may be, that when Ragland had refused to become surety for King, the latter, when he went to Milam, made such arrangements with him as to indemnify him against loss as to the whole debt, or as to induce him to take upon himself the primary liability, as between himself and his co-surety, Ragland. The repeated declarations of Milam, that he was bound to protect Ragland, and that so long as he was able to pay Ragland should not pay anything on this note, can be accounted for on no other hypothesis. There is no evidence that these declarations were made under any mistake of either fact or law, and in the absence of such testimony we are not authorized to infer that such was the case.

We are of opinion, therefore, that the Probate Court did not err in refusing to charge Ragland with one half the debt due to the Branch Bank at Huntsville, and in allowing him credit for the sum paid by him on that debt, with interest thereon until the settlement.

The only other error assigned relates to the refusal of the Probate Court to charge Ragland with the sum of $100 cash on hand at the death of the intestate. When this case was last here (19 Ala. 85), we held, that the proof then presented by the record was not sufficient to discharge him from liability to account for it. The proof in this record shows that it was placed in the hands of the witness, Wilson, by the intestate,

for safe-keeping; and he testifies that, in a day or two after the death of James W. Milam, witness handed the money over to Jarvis J. Milam, the present administrator *de bonis non*. We do not think that, in a settlement with the administrator *de bonis non*, who has the disputed fund in his possession, and, from all that appears, has so held it since the death of the intestate, he should be allowed to recover it from the administrator in chief, who, in truth, never possessed himself of it during his administration. If this fund were in the hands of one who was a stranger to the administration, and who was able to pay it, the result might be very different; but as it is traced to the hands of the present administrator *de bonis non*, Ragland has shown enough to exempt him from further accounting for it with him.

Let the decree of the Probate Court be affirmed.

CHILTON, C. J., not sitting.

GLIDDON *vs.* McKINSTRY.

1. A person who has obtained a judgment in his own name, and promised in writing to pay a specified sum out of its proceeds, when collected, to another, is bound to use due diligence in the collection of it: and if only the sum specified is collected, the promisee has a preference right to it.
2. In declaring (under the Code) against a person for neglecting to use due diligence in the collection of a judgment, out of the proceeds of which, when collected, he had promised in writing to pay a specified amount, it is not necessary to aver in what respect he had failed to use due diligence: an allegation that "he has failed and omitted to do so from mere neglect," is sufficient.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was commenced by summons and complaint under the Code. The complaint contains two counts, which are as follows: "Plaintiff claims of defendant $225, due on an order drawn by John A. Cuthbert on the 27th day of

June, 1846, to-wit: 'Alex. McKinstry, Esq.—Please pay to John Gliddon $225 out of the proceeds of a judgment from the County Court of Mobile, in your favor, against A. C. & A. Hollinger, when collected; this sum to be credited on your acceptance of an order in my favor for money to be collected on said judgment"; which said order was accepted by said McKinstry, payable to John Gliddon; and though money sufficient to satisfy said order has been received by defendant, he has failed to pay said order, and it is still due and unpaid. And plaintiff further claims of defendant $225, for that he, said defendant, did accept a certain order, drawn by John A. Cuthbert on the 27th day of June, 1846, as follows:" (setting it out as before); "which said order, so drawn as aforesaid upon said defendant, he accepted on the day last aforesaid, to-wit: on the day of the date of said order, and then and there undertook and promised to use due diligence to collect the judgment named, and when so collected to pay the amount of said order to said plaintiff; and plaintiff avers, that by reasonable diligence the defendant could have collected said money upon said judgment, but has failed and omitted to do so from mere neglect, and has failed to pay said plaintiff said sum of money specified in said order, accepted as aforesaid, which still remains unpaid."

The defendant demurred to the declaration, "for a misjoinder, the first count being *ex contractu*, and the second *ex delicto;* and to the second count separately, 1st, because the instrument set out in it does not impose on the defendant the duty of using due diligence to collect, and plaintiff shows no other facts whereby the omission complained of could give him his action"; and, 2d, because the facts pleaded in it do not create a breach of the promise declared on, which authorized the complaint made in the second count." The court overruled the demurrer to the whole declaration, and sustained that to the second count separately; and the defendant then pleaded, that the judgment mentioned in the order was obtained on a note which came to defendant's hands under a deed of trust made by one Thomas A. Carr, subject first to the payment of an unascertained sum due to one C. A. Gilbert, the balance to be applied to the protection of one Drury Thompson, who was an accommodation endorser for said

Carr for $100, and the residue only after discharging these prior rights going to said Carr; that Carr drew an order on defendant, payable from such residue to said Cuthbert, on which right of Cuthbert's the order sued on was drawn; that the whole amount collected on said judgment has not been sufficient to pay said Gilbert and Thompson, and so defendant says he does not owe the plaintiff.

The plaintiff demurred to this plea, but his demurrer was overruled; and having refused to reply, the court rendered judgment in favor of the defendant. The sustaining of the demurrer to the second count in the declaration, is now assigned for error.

E. S. Dargan, for appellant.

R. H. Smith, *contra*.

GOLDTHWAITE, J.—We regard the second count as averring, in substance, that the defendant had obtained a judgment in his own name against certain persons, and agreed in writing to pay a specified amount of this judgment to the plaintiff. If he had agreed, upon a valid consideration, to pay the plaintiff a certain sum out of a note due to himself when collected, the promisor would be required to use reasonable diligence in the collection of the debt, and he would be liable if the fund, out of which the payment was to be made, was lost by his neglect. Diligence, in such case, would be implied as a term of the contract.—Ogden v. Sanders, 12 Wheat. 341; White v. Snell, 9 Pick. 16; Story on Con., §§ 11, 12. The party to whom the debt was owing, and who was invested with its direction and control, would, under such circumstances, be regarded in chancery as the trustee for the beneficial owner, and should be chargeable at law, whenever the form of the transaction will admit the application of a legal remedy, precisely upon the same principles which would hold him responsible in equity. Here the intendment is, that the defendant controlled the judgment in his own favor; and as that was the source from which he promised to make the payment, he was impliedly bound to use due diligence to collect that fund.

It is urged, however, that the count is defective, for the

reason that it does not appear that the plaintiff would be entitled to the amount to be paid out of the judgment, if that amount only was collected. The order here was drawn by Cuthbert, who at its date was entitled to the entire proceeds of the judgment; and it cannot be doubted, that if a party, entitled to the proceeds of a debt in the hands of another, appoints a portion of it to be paid to a third person, that such person has a preference right over the assignor, to the portion assigned him.

It is also insisted, that the count is defective, in not showing in what respect the defendant had failed to use due diligence. The rule requires the acts or omissions which make the liability to be alleged, that the defendant may be enabled to prepare his defence, and the court to see the liability; but it is not always required that the pleader should go into particulars, and set out every constituent of the act or omission. Thus, in an action by the endorsee against the drawer of a bill of exchange, it is not necessary to aver specifically the notice given. The general allegation, that he had notice, is sufficient.—Boot v. Franklin, 3 John. 208. Here the want of due diligence is essential; but the allegation of the want of such diligence, in general terms, or, what is tantamount to it, that the defendant failed to collect the judgment from mere neglect on his part, is enough to enable the court to see the liability, and to pronounce judgment, and the party guilty of the omission must be presumed to know the particular facts of which the omission consists.—Elredge v. Long Island R. R. Co., 1 Sand. Sup. Ct. Rep. 89; White v. Snell, *supra*.

It follows from what we have said, that the court below erred in sustaining the demurrer to the second count.

Judgment reversed, and cause remanded.

HOUSTON, Ex'r, &c., *vs.* BR. BANK AT HUNTSVILLE.

1. It is a general rule, founded on principles of natural reason and justice, that a surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which the creditor had for the purpose of reimbursing himself; but he can acquire no greater rights than the creditor had.
2. G. executed a deed of trust to secure the acceptors of two bills of exchange, one of which, drawn by himself, and endorsed and accepted for his accommodation, was negotiated and held by the Branch Bank at Huntsville, and the other, to which he was no party, but which was drawn, endorsed and accepted for his accommodation, negotiated and held by the Branch Bank at Decatur; the debt to the latter Bank was extended under the act of 1837, the bill delivered up to the drawer and cancelled, a new note executed by him, with the other endorser and G. as sureties, and another deed thereupon executed by G. to secure the payment of this note: *Held*, that the payment of this note by the surety did not entitle him, under the equitable doctrine of subrogation, to share in the security afforded by the first deed.

Error to the Chancery Court of Lauderdale.

Heard before the Hon. E. D. Townes.

The original bill in this case was filed by Hervey Dillahunty and John Chisholm; and the former having died, the suit was revived in the name of Pugh Houston, his executor, who is the plaintiff in error. The object of the bill was, to establish Dillahunty's right to share with the Bank in the security afforded by a certain deed of trust, and to enjoin a judgment at law which the Bank had obtained against Chisholm as Dillahunty's surety on certain notes hereinafter particularly described. The facts of the case, as disclosed by the pleadings and proofs, may be briefly stated as follows:

The said deed, conveying real and personal property, was executed by William W. Garrard, on the 14th of September, 1836, to Thomas U. Lassiter as trustee, to secure Taylor, Mason & Co. against their accommodation acceptance of two bills of exchange, one of which, drawn by Garrard, was endorsed by Henry Garrard and John Arnett, and negotiated and held by the Branch Bank at Huntsville; and the other, to which said Garrard was no party, but which was drawn by William Arnett for his accommodation, and endorsed by

Henry Garrard and said Hervey Dillahunty, was negotiated and held by the Branch Bank at Decatur. The debt to the Decatur Bank was afterwards extended under the act of 1837; the bill delivered up to the drawer, William Arnett, and cancelled; new notes executed by him, payable in three annual installments, with said William W. Garrard and Hervey Dillahunty as sureties; and another deed thereupon executed by said Garrard to John H. Arnett, as trustee, to secure the payment of these notes. The bill charges, that the complainant Dillahunty did not intend, by taking this second deed, to waive any rights which he might have under the first deed, and that he took the second deed only because it was doubtful whether the first had been legally acknowledged and registered.

The first installment on the new notes was paid by said Garrard, and the balance of them by said Dillahunty. The trustee in the first deed afterwards sold the property conveyed by it, pursuant to its terms; at which sale Dillahunty became a purchaser of a portion of it, and gave his notes, with said Chisholm as surety, for the purchase money. The trustee assigned these notes to the Branch Bank at Huntsville, and judgment was afterwards obtained on them by the Bank against said Chisholm, which is the judgment sought to be enjoined. The complainant, Dillahunty, insisted that, if the first deed was held inoperative on account of its imperfect acknowledgment and registration, then he was entitled to the entire proceeds of the sale of the property; and that, if that deed was held valid, then he should be subrogated to the rights of the Branch Bank at Decatur under it. The chancellor dismissed the bill, and his decree is now assigned for error.

L. P. & R. W. WALKER, for the plaintiff in error:

1. The principal creditor is, in equity, entitled to the full benefit of any security given by the debtor to his surety for his indemnity.—7 Ala. 362-7; 8 *ib.* 866-72; 4 Comstock 313; 1 White's Eq. Cas. 120, and cases cited; 1 Johns. C. 119, 129; 5 Barb. S. C. R. 398-405. A security given by the principal debtor to one surety enures to the common benefit of all the sureties.—1 White's Eq. Cas. 99; 5 Barb. S. C. R. 405, and

authorities *supra*. Hence, the first deed of trust, although made nominally for the benefit of Mason, Taylor & Co., the acceptors of the bill, enured to the benefit of the Decatur Bank, which discounted the bill, and which was the real creditor; and all of the sureties were entitled to the benefit of the deed. The doctrine of subrogation is the creature of equity, and is administered so as to secure essential justice, without regard to form. As between the principal and surety, payment by the surety is in the nature of a purchase by the surety from the creditor. It operates, in equity, an assignment of the debt and of all legal proceedings on it, and gives a right in equity to call for an assignment of all securities; and in favor of the surety, the debt and all its obligations and incidents are considered as still subsisting.—3 Leigh 272, (295); 1 White's Eq. Cas. 103-4, 107-11, and cases cited; 14 Vesey 162; Lyon v. Bolling, 9 Ala. 466.

The doctrine of Copis v. Middleton, 1 Tur. & Russ. 229, (11 Eng. Ch. R.), adopted by this court in Foster v. Trustees of Athenæum (3 Ala. 302, 310), has no application to this case, inasmuch as that doctrine does not reach a case where the security is distinct from the surety's obligation, and cumulative and collateral to the original debt.—1 Tur. & Rus. 229; 3 Myl. & K. 190; 9 Ala. 464, 467; 14 Vesey 162; 1 White's Eq. Cas. 108-9, 110-11. But the doctrine of Copis v. Middleton is not law.—11 Leigh 309; 12 *ib.* 274; 1 Speer's Eq. 534, 543; 1 Barr 512; 2 Brock. 160; Pride v. Boyce, Rice's Eq. Rep. 276. The only courts holding to it are those of Vermont, North Carolina and Alabama. The deed of trust being an accessorial security, if Dillahunty (the surety) has paid the debt secured by it, he is entitled to be substituted to all the rights of the Decatur Bank under it.—1 Tur. & Rus. 229; 9 Ala. 464.

2. Has Dillahunty, as a surety of W. W. Garrard, paid the debt secured by the first deed of trust? The facts all show, that W. W. Garrard was the real debtor; and equity will unquestionably consider Dillahunty, the endorser for his accommodation, as his surety. It is true, the original bill of exchange described in the deed of trust was afterwards taken up by the note of Arnett, W. W. Garrard and Dillahunty, given under the extension law of 1837, and that by this

arrangement the form of the debt and the time of payment were changed. But this change in the form and time of payment did not affect the identity of the debt. Equity looks to the substance, not the form of things; and if the debt paid by Dillahunty, as surety on the note, is the identical debt evidenced by the bill of exchange of which he was endorser, and which was secured by the deed of trust, then the deed still subsisted as a security, following the debt through all its phases, and Dillahunty can hold to it as a lien for his indemnity. In the case of the substitution, exchange, alteration, or renewal of bills or notes, the identity of the debt is not lost by the operation. The debt remains the same; the evidence of the debt only is changed.—14 Ala. 46; 10 S. & M. 120, (128). Independent of this general rule, it is obvious that under the relief law of 1837 (Clay's Dig. 112, § 51), the new note given in this case was a mere extension, not an extinguishment or payment, of the old debt.—14 Ala. 633; *ib.* 33, (46); 4 Hill 448.

It may be true, as argued by the chancellor, that all right of action was lost to the Bank by the giving of the note in lieu of the bill; still that does not affect the question of lien in any way.—14 Ala. 33, (46); 1 White Eq. Cas. 111. Nor does it matter that there was a change of parties when the note was given; the *debt* was still essentially the same.—10 S. & M. 120. Suppose a creditor, holding a note against one and his surety, the note being secured by deed of trust, sues the principal, obtains judgment and execution, and a delivery bond is given and forfeited, and judgment thereon is rendered against the principal and sureties on the delivery bond; does this change in the form of the debt, and the presence of additional parties to it, affect its identity, or impair the lien of the creditor under the deed? If the identity of the debt remains, i. e., if it be the same debt, then all accessorial securities continue to subsist, despite changes in the form of the debt. Absolute payment of the mortgage money, or a re-conveyance by the mortgagee, can only destroy the lien of the mortgage. The mere cancellation of the note, and substitution of a new one, has no such effect.—2 U. S. Eq. Dig. 351, § 1285. That the taking up of the bill, and the execution of a new note with an extension of payment, does not discharge the lien of the deed of trust, see 14 Ala. 33 (46), 633; 4 Johns. Ch. 65; 8 Blackf.

99; 10 S. & M. 120; 2 U. S. Eq. Dig. 348-9, §§ 1230, 1233, 1234-7. 1274-7, 1285-6, 421; 18 Ala. 42.

3. But admitting that the original debt secured by the first deed of trust was paid by the extended note, does this alter the case? The original debt was really W. W. Garrard's; and Dillahunty, being his accommodation endorser, was his surety. Now, if the extended note paid the original debt, who paid it? Certainly, the makers of that note, of whom Dillahunty (the accommodation endorser on the bill, and *ex vi termini* the surety) was one. Upon this payment by Dillahunty of the original debt, he was subrogated to the rights of the Bank under the deed; and without even waiting until he had actually paid off this extended note, he could have filed his bill to have it discharged out of the proceeds of the sale under the trust deed, applying the *pro rata* share of the Decatur Bank for that purpose.—11 Ala. 352; 1 White's Eq. C. 87-90; Rice's Eq. Rep. 276; 1 Speer's Eq. 534-43; 6 Gill & Johns. 243; 4 Johns. Ch. 123; 1 Bland's R. 103-5; 1 Rand. 53; 3 Ired. Ch. 513; 5 Barb. S. C. R. 398 (410). A payment by a surety, by giving his negotiable note, entitles him to subrogation.—1 White's Eq. Cas. 102; 5 Barb. S. C. R. 398 (410); 2 Metc. 561.

It will be found, that all the cases relied on by the chancellor, as sustaining his decree, were cases in which there was no independent accessorial security, e. g. where there was a joint note, or a joint judgment, and nothing more. There, according to the authorities cited by the chancellor, the note, or the judgment, being paid, was *functus officio*, and "got back" to the principal debtor, leaving nothing independent of the note or the judgment, by which the surety could be reimbursed. Here, the bill of exchange and the deed of trust were independent contracts, and payment of the bill did not, of itself, operate a satisfaction of the deed; for that depended on the question, who paid it? If paid by the grantor, then the deed was satisfied: but if paid by a surety, the deed still continued in full force for his indemnity. A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the parties.—Starr v. Ellis, 6 Johns. Ch. 393.

S. D. CABANISS, *contra*:

1. The right of subrogation must arise during the existence of the liability for which the lien was given, for the obvious reason, that when the liability is extinguished, the lien, having accomplished its purpose, is discharged, and the party to whom it was given, having no farther claim to the security, has no right to which any one can be subrogated. When a surety pays the debt to the creditor, he is regarded, in equity, as the purchaser of the debt, and is therefore entitled to the security given the creditor, as an incident to the debt. In that case, the debt is not regarded as being extinguished, but assigned to the surety.

2. But when the Decatur Bank accepted of W. W. Garrard the extension note, and surrendered to him the bill of exchange, the liability of Taylor, Mason & Co., as acceptors of the bill, was, *eo instanti*, extinguished; the security given them against that liability, being no longer necessary for their protection, was discharged, and "got back" to W. W. Garrard; and they, the acceptors, ceased to have any right to it, to which any one could be substituted.

3. But the Decatur Bank and Garrard did not occupy the relation of creditor and debtor during the existence of the lien. If the extension note had not been taken, the Bank could not have sustained an action against him, or reached his property, except as the garnishee of Taylor, Mason & Co., upon the allegation of their insolvency; and any other creditor of Taylor, Mason & Co. would have had the same right. Garrard was a stranger to the bill; there was no privity of contract between him and the Bank; the bill was discounted, not upon his credit, but on that of the parties to it. The effect of the transaction was this: that Taylor, Mason & Co. borrowed money from the Bank on their acceptance, to be advanced or loaned to Garrard, and the latter gave Taylor, Mason & Co. a security to place them in funds to meet a debt contracted by them for his accommodation. They became the debtors of the Bank and the creditors of Garrard. If this position be correct, then Dillahunty could not claim through the Bank as creditor of Garrard, nor could the Bank claim as a creditor, during the existence of the lien, through Taylor, Mason & Co., as sureties of Garrard.

4. But if it should be considered that the Decatur Bank was, as holder of the bill, the creditor of Garrard, and as such had the right of substitution to Taylor, Mason & Co.'s lien, after their liability was discharged, yet, we contend, that Dillahunty cannot claim that right through the Bank, for that would be claiming a right of being subrogated to a right of subrogation, and extending the doctrine a step farther than the courts have ever gone.

5. If Dillahunty and Taylor, Mason & Co. are regarded as co-sureties for Garrard on the bill, he is precluded from asserting any right to the lien, by reason of such co-suretyship; for the reason, that long before he made any payment on the debt, he consented to the discharge of Taylor, Mason & Co.'s liability, and (as a consequence) to the extinguishment of the lien given them as an indemnity; and for the further reason, that he at the same time bargained for and got an independent security in the deed to Arnett, the terms and stipulations of which were inconsistent with and repugnant to those of the deed to Lassiter.

The following authorities are relied upon:—10 Leigh's Rep. 221; Bank of Virginia v. Boisseau, 12 *ib.* 387; Leading Cases in Equity, pp. 99, 100, 101, and notes; Brown v. Lang, 4 Ala.

CHILTON, C. J.—William W. Garrard, having executed a trust deed to T. U. Lassiter, trustee, to save Taylor, Mason & Co. harmless by reason of their acceptance of two bills of exchange, one drawn by him, and sold to the defendant in error, the other by Wm. Arnett, in favor of Henry Garrard, and endorsed by him and Hervey Dillahunty to the Decatur Bank, but solely for Wm. Garrard's accommodation, which was done on the 14th December, 1836, afterwards. on the 25th June, 1838, availed himself of the law of 1837, authorizing the extension of indebtedness to the Banks; and thereupon Wm. Arnett, the drawer, executed his note, payable in three yearly installments, with Hervey Dillahunty and W. W. Garrard sureties, and took up said bill of exchange held by the Decatur Bank. At the same time, the said Wm. Garrard, who was the real principal, executed another deed in trust to John H. Arnett, embracing a portion of the property included in the

deed to Lassiter, with other property not embraced, with provisions varying from those contained in the first deed. Dillahunty has paid a portion of these last named notes to the Bank at Decatur, and he now seeks to come in and share in the security which the first deed afforded to that Bank, for the payment of the bill which was taken up by Arnett, the drawer, on the execution of the notes and deed above named. The question is, shall he be relieved under the equitable doctrine of subrogation?

We have carefully looked into the cases which bear upon the question, and although, from the very general and loose terms in which some of them assert the doctrine, they might be considered as supporting the complainant's case, yet we feel very confident that the current of the modern and more authoritative cases, both in this country and England, is opposed to the claim which is set up. It is not denied, that the general rule is, that the surety, paying off a debt, shall stand in the place of the creditor, and shall have all the rights which he had, for the purpose of being reimbursed the amount he has paid. We may concede, too, that this doctrine should be favored, as it is founded on the principles of natural reason and justice.—Hodgson v. Shaw, 3 My. & K. 190-1-2. But the surety, thus paying, can certainly acquire no greater right than the creditor whose position he is enabled to take by the decree of the court. The cases which have carried this doctrine further than any others, are Parsons v. Briddock, 2 Vern. 608, and Wright v. Morley, 11 Ves. jr. 22; and these establish, that where the creditor sues the principal, and the latter gives bail, and a judgment is likewise obtained against the bail, but the sureties on the original bond are compelled to pay, they may avail themselves of the judgment against the bail for their reimbursement; in short, that the surety, paying the debt, had precisely the same rights which the creditor had. But, speaking of the last of these decisions, Judge Story says, it has been much questioned, and must now be deemed to be much weakened in point of authority.—1 Story's Eq. § 499 a.

What is meant by subrogation, a term which has been borrowed from the civil law? It is the substitution of a new for an old creditor; or, in its more general sense, "the act of putting, by a transfer, a person in the place of another, or a

thing in the place of another thing."—Bouv. Inst., vol. 2, p. 69; *ib.*, vol. 1, p. 321. By this transfer, the new creditor is subrogated to all the rights of the original creditor. To ascertain, therefore, the rights which complainant may lawfully claim, we must first see what were the rights of the Decatur Bank at the time of the payment of this debt by Dillahunty: for to these rights alone he can succeed.

It cannot be denied, that the giving of the note by William Arnett, with Dillahunty and William W. Garrard as sureties, and the execution of the trust deed by Garrard to John Arnett, and the surrender of the bill of exchange by the Decatur Bank to the drawer, is an absolute extinguishment of all liability on the part of Taylor, Mason & Co., as acceptors of the bill. This substitution of the notes for the bill was, as to these acceptors, a payment by Garrard; and he was therefore, according to the very terms of his deed to Lassiter, discharged from all further obligation to them in respect of its payment. The bill being *functus officio*, and having been delivered up to the drawer, the party primarily liable, and cancelled, what right had Taylor, Mason & Co. to insist upon the security provided in the trust deed to Lassiter, so far as respects it? The deed, as to it, according to its terms, became void and of no effect. Any attempt, therefore, on the part of Taylor, Mason & Co., to set it up as a subsisting security for their indemnity on account of this bill, which was discharged and cancelled, would have been a clear violation of the stipulations of the deed.

Having seen that the deed, as to them, with respect to this bill, was satisfied and "void and of no effect," let us see whether the Decatur Bank could have pursued the property. There is no privity as between the Bank and the deed, except through the bill. The security taken by the acceptors enured to the benefit of the Bank, upon the principle, that all parties to the bill being liable and equally bound to the Bank for its payment, no arrangement entered into between them could withdraw their property from liability to satisfy the demand, so long as it remained the property of either. Upon breach of the condition of the deed in the non-payment of the bill, the Bank would have been substituted for the acceptors, or, if you please, subrogated to their right to have the trust exe-

cuted, and the proceeds applied to the payment of the bill, thus carrying out its object—the security and protection of Taylor, Mason & Co.—by satisfying their obligation and discharging them from liability.

But the Bank accepted another security, and agreed forever to discharge Taylor, Mason & Co.; at least, such is the effect of this arrangement, and whether the notes taken in virtue of the arrangement are paid or not, the Bank has surrendered all right to proceed on the bill against the acceptors, and consequently all right to avail itself of a security which the acceptors had taken, which security was discharged the moment the acceptors were released.

To illustrate my meaning: Suppose the Bank, after delivering up the bill, and after the notes, taken in lieu of it, had fallen due and remained unpaid, had filed a bill to have the trust executed in its favor; upon what principle could the court have afforded relief? The trustee, Lassiter, could have replied, "You seek to enforce a contract, which, by your own act, you have rendered void and of no effect according to its very terms." He might further add, "I was authorized to sell this property for the protection of Taylor, Mason & Co., on their acceptance of the bill of Wm. Arnett, having eight months to run. This bill has been discharged. They have been fully protected; the object of the bill, as to them, has been accomplished. They have exhibited to me the bill, taken up by the drawer and cancelled." What then? Can the chancellor make a new contract for the parties? Can he add new stipulations to the satisfied deed, or prescribe new objects to be accomplished by it, wholly foreign from what was in the contemplation of the parties when it was executed? Clearly he cannot.

But it is said, the *debt* still exists, although the evidence by which its existence is proved has been changed; and that the Court of Chancery will not sacrifice the justice and substantial merits of the case in deference to mere form. To this we reply, that as to the essential party through whom the equity is to be worked out in favor of the Bank—the acceptors—the proposition is not true: the debt, as to them, does not exist, but is satisfied, paid, and discharged; and this necessarily puts an end to their right to go upon the security which the

deed till then afforded. Having no such right, it follows as a necessary consequence, that none could be imparted through them to the Bank, much less to a party to the bill who has discharged it, by entering into a new and different agreement with the creditor, upon the faith of a new and different security for his indemnity, executed by the principal debtor.

The principle settled in Copis v. Middleton (1 Tur. & Russ. 224-231), by Lord Eldon, which is fully sustained by Lord Brougham in Hodgson v. Shaw (3 Myl. & K. 183), and said by Judge Story to be a masterly exposition of the doctrine upon this subject (Story's Eq. Juris. § 499 c, note 1, p. 561, 4th ed.), fully sustains the view we take of this case. Lord Eldon said: "It is a general rule, that in equity a surety is entitled to the benefit of all securities which the creditor has against the principal. But then the nature of these securities must be considered. When there is a bond merely, if an action is brought upon the bond, it would appear, upon oyer of the bond, that the debt was extinguished. The general rule, therefore, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back, upon payment, to the person of the principal debtor." The effect of the discharge of Taylor, Mason & Co., we have seen, satisfied the deed, with respect to this bill, as to them, and the property embraced in it went back to the grantor, or, rather, was retained by Lassiter for the satisfaction of a demand with which the Decatur Bank had no connection. As between W. W. Garrard and Taylor, Mason & Co., it was the duty of the latter, at the request of the former, to have entered satisfaction, as to the cancelled bill, on the deed.—See Clay's Dig., p. 156, § 32. But having satisfied the deed as to this demand, it remained as security for the bill to the Huntsville Bank, and it would be inequitable, in our opinion, to divert the fund from that object; for, if it is to be apportioned between the two demands, by which Taylor, Mason & Co. are left to pay the balance to the Huntsville Bank, it will be, in effect, to make them respond to the payment of the bill, from which they have been discharged, to the extent of the fund, which will be withdrawn from their indemnity, and applied towards refunding money paid out by one of the sureties on the notes

given to renew or extend it. We think it would not only be unjust to deprive Taylor, Mason & Co., or the Huntsville Bank, of the full benefit of this security, in favor of those who have voluntarily cancelled the original demand, by assuming its payment on the faith of a new and different security; but to put Dillahunty in the place of Taylor, Mason & Co. would be carrying this doctrine of substitution beyond any case we have seen, and farther than is warranted by principle. It would be to deprive a surety of an advantage fairly obtained—to subrogate to a supposed right of subrogation, which right, as we have shown, was voluntarily yielded up by the Bank at Decatur, in consideration of other security for the demand given by the principal debtor, by surrendering the bill, and discharging and displacing the party through whom alone a privity could be established as between the Bank and the trust deed.—Story's Eq. Pl., §§ 262, 514.

The cases cited from our own Reports do not conflict with the view we have taken. In all of them, where the doctrine of subrogation has been applied and upheld, there were rights, to which the complainant could be subrogated, existing at the time of the payment. Such is not the case here; but this case is more nearly assimilated to that of Brown v. Lang *et al.*, 4 Ala. Rep. 50-54. In that case, the principal debtor died, and after his death his administratrix and sureties on the original demand made from time to time new notes, taking up and cancelling or extinguishing the old. Finally, the sureties were compelled to pay the debt; and the question was, whether they should not be subrogated to the rights of the creditor, and be reimbursed out of the estate of the original debtor. The court say: "There is nothing in the record from which it can be inferred that the Bank did not intend to discharge the intestate's estate from all liability to pay the note of which he was a joint maker; and we cannot, against the direct allegation of the bill, suppose that there was a continuing liability. The creditor, then, could not, at law, or in equity, have charged the estate of the intestate in the hands of his administratrix; *and the surety, whose claim is deduced through the creditor, cannot look to any source of reimbursement of which the latter could not have availed himself.*"

This principle, we think, is decisive of the case before us;

for it is too clear to admit of argument, that Taylor, Mason & Co. were discharged by giving the new notes and cancelling the bill.

There is no error in the decree of the chancellor, and it is consequently affirmed.

KNIGHT'S ADMINISTRATORS *vs.* VARDEMAN.

1. An inference of fact can only be drawn by the jury; a charge, therefore, which assumes that a conversion is proved, when the evidence only establishes an intention to convert, is erroneous.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

ASSUMPSIT by Rachel Vardeman against Henry D. Knight's administrators for money had and received by defendants' intestate for the use of the plaintiff. Plea, "the general issue, with leave to give in any special matter." On the trial, the plaintiff offered one Greenlee Holley as a witness, who testified, that he was his mother's surety on certain notes, payable to plaintiff, which had been given for the purchase money of a tract of land; that these notes fell due in January, 1850, and during that month he paid them (amounting to about $384) to said Henry D. Knight, who had them in his possession; that he never heard Knight say anything about being plaintiff's agent, and never heard him say to whom the notes belonged; that when he paid the notes to Knight, the latter said "he had plenty of money to take him to California." The plaintiff also offered one Green Turner as a witness, who testified, "that he saw said Holley pay the money to Knight; that he was speaking about going to California with Knight; that after Holley had left the room, Knight got out some more money from his desk and counted it: Knight then had $400 or $500, and said "he had money enough to go to California, and that the old lady would not need the

money until he could go there and back; that this conversation was had in January, 1850, but no old lady in particular was named." One Mark Boulware, another witness for plaintiff, testified, "that about the first of January, 1850, he and Knight had a conversation, in which Knight told him, that he had some money to collect in a few days from Greenlee Holley, or Mrs. Holley, and that it belonged to Mrs. Vardeman; it was some $300 or $400; plaintiff then lived, and now lives, in Texas; Knight said, he would mail it to her, and take the postmaster's receipt; he was a man who did what he said he would do; he went to California in February, 1850, as well as now recollected, and died on his way there."

This was all the evidence; the defendants offered none; and the court thereupon charged the jury, "that, although the law would require a demand of the money from defendant before suit brought, yet, if they believed the evidence, there was such a conversion of the money by Knight as would supersede the necessity of a demand, and plaintiff was entitled to recover the amount collected, with interest from the date of the writ until the present time." The defendants excepted to this charge, and they now assign it for error.

WHITE & PARSONS, and J. E. BELSER, for appellants, contended that the evidence did not establish a conversion, so as to authorize the court to assume that fact as proved, and therefore the charge was erroneous. They cited Kidd v. King, 5 Ala. 84; Stewart v. Frazier, 5 *ib.* 114; Goldthwaite v. McWhorter, 5 Stew. & P. 284; Sally's Adm'r v. Capps, 1 Ala. 121; McBroom v. Governor, 6 Porter 32; Johnson v. Collins, 20 Ala. 445; 11 Wheat. 321; 4 Phil. Ev. (C. & H. Notes), pp. 784, 467.

J. FALKNER, *contra*, cited Stewart v. Frazier, 5 Ala. 114, and Parminter v. Kelly, 18 *ib.* 717.

LIGON, J.—We do not think the evidence in respect to the conversion by Knight of the money collected of Holley for the appellee, is of that clear and conclusive character which would justify the court in taking it for granted that the fact of conversion was proved. It is true, the jury might infer from the facts proved, that Knight used the money in paying

the expenses of his trip to California; but this would be an inference of one fact from the existence of another, and such an inference can only be drawn by the jury. If the court assumes to draw it, it invades their province and commits an error.—Williams v. Cannon, 9 Ala. 348.

Such, we think, was the case with the Circuit Court in this instance. The payment of the money by Holley to Knight, on account of the appellee, was deposed to by two witnesses, one of whom also testifies to a conversation with Knight which tends to show that he *intended* to use the money thus collected to defray his expenses on a trip to California; but such testimony is by no means *conclusive* to show that he did so use it; and to justify the charge of the court it should be conclusive, and not merely persuasive, of the existence of the fact assumed.—Bradford v. Marbury, 12 Ala. 520. The testimony of Boulware, which was introduced by the plaintiff, goes also to the intentions of Knight as to the disposition he *intended* to make of the money which he was to receive, and did afterwards receive from Holley, on account of Mrs. Vardeman. The intention expressed by him to this witness was, that when he collected the money he would remit it to his principal by mail, and take the postmaster's receipt for the letter containing it; and the witness adds, "he (Knight) was a man of his word, and generally did what he said he intended to do." This evidence tends to show, that the money was sent to the appellee, but is by no means conclusive of it. The jury might place greater reliance on this witness, than on the one who deposed that Knight intimated to him his intention to use the money otherwise. We do not say this should have been done; but the jury certainly had the privilege to do so, and they have the sole right to weigh the evidence which is thus apparently conflicting. Under the charge of the court, this right was taken from them. This was an error, for which the judgment must be reversed.—Gaines v. Harvin, 18 Ala. 491.

Let the judgment be reversed, and the cause remanded.

DERRETT *vs.* ALEXANDER.

1. On a trial of the right of property under the statute, the declaration of the person in whose possession the property was found, made at the time the attachment was levied on it, that it was brought to his house by the defendant in attachment, is admissible evidence against the claimant.
2. The contents of an attachment, which is shown to be lost, may be proved by secondary evidence.
3. The death of the animal attached, before the trial of the claim suit, does not affect the right of recovery, and evidence of it is therefore inadmissible.
4. When two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the execution, is conclusive evidence that it is also subject in the other.
5. The payment by the claimant of the assessed value of the property in the first case, does not, of itself, sustain his claim in the second.
6. If the property is found subject to the attachment, it is erroneous to render judgment in the claim suit against the sureties on the replevy bond; and where the case is removed by *certiorari* from a justice's court, it is also erroneous to render judgment for the assessed value of the property against the sureties on the *certiorari* bond.
7. When the property is condemned in the Circuit Court, the proper practice is, to certify the judgment, with a *procedendo*, to the justice, who thereupon issues execution; if the defendant fails to deliver the property, the failure being endorsed on the claim bond, which is filed with the justice, execution issues against the principal and surety therein for the assessed value of the property, if that value does not exceed the amount of the judgment and costs in the attachment suit, and if it exceeds that amount, then for the judgment and costs; but for the costs of the claim suit, on the trials before the justice and in the Circuit Court, the latter court should render judgment against the claimant and his sureties on the *certiorari* bond.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. ROBERT DOUGHERTY.

TRIAL OF THE RIGHT OF PROPERTY in a mare, between James E. Alexander, plaintiff in attachment, and William Derrett, claimant. The bill of exceptions states, that "it was shown on the trial that the plaintiff had sued out two attachments against one John Derrett, both returnable before a justice of the peace; that both attachments were levied on the mare now in controversy, and a claim interposed in each case by William Derrett; that a trial of the right of property was had in each case before the justice, and both cases were re-

moved by *certiorari* to the Circuit Court; that one of the cases was there tried at the Fall term, 1852, and the issue was found in favor of the plaintiff;" that the defendant on that trial, *John* (?) Derrett, took a bill of exceptions under the hand and seal of the presiding judge; that said bill of exceptions, together with the attachment in that cause, was lost, or stolen, from the clerk's office. The evidence further conduced to show that the plaintiff relied on the same proof to condemn the property in that case as in the present, and on the same witnesses. Uriah Beason, a witness for plaintiff, testified that he levied the attachment in this suit; that when he levied the attachment, he found the mare in the stable of James Derrett, who said, at the time he made the levy, that John Derrett (the defendant in the attachment) brought the mare to his house. Claimant objected to the declarations of James Derrett, who was a competent witness and then present in court; but his objection was overruled, and he excepted. Neither John Derrett, nor claimant, was present when these declarations were made by James Derrett.

"Plaintiff offered in evidence the judgment in the former claim suit, which had been tried at the Fall term, 1852. There was no complete record of the case, as the attachment had been lost. Plaintiff proved the existence of the attachment, its loss, diligent search for it by the clerk, and its contents; all of which was done against claimant's objections, and he excepted.

"Claimant proved that the jury which tried the former claim suit assessed the value of the mare at $50, and that he had paid off the judgment and costs in that case. He also offered to show that the mare had died before the trial in the justice's court; but the court ruled out the evidence, on plaintiff's objection, and claimant excepted.

"The court charged the jury, that, if they believed from the evidence that the two attachments were levied on the mare in controversy about the same time, and that claimant had interposed a claim to the property in each case, and that the issue on the trial of the right of property at the Fall term, 1852, was found in favor of the *claimant* (?), then they must find for the plaintiff, as the judgment in that event, obtained by *plaintiff* at Fall term, 1852, was conclusive; to which

charge claimant excepted, and asked the court to charge as follows: that, if they found under the charge already given that the claimant was concluded by the former judgment in the former attachment suit, then, if the jury were satisfied from the evidence that the claimant, or his surety, had paid off and discharged the judgment for the full amount of the value of the mare, *and* the claimant was only liable for the value, and if that value had been assessed and paid they could not assess the full value again; which charge the court refused to give, and claimant excepted."

The jury returned a verdict finding the property subject to the attachment, and assessing its value at $55; and the claimant then moved in arrest of judgment, on account of his having paid the assessed value of the property in the former case. This motion was overruled by the court, and judgment was rendered against the claimant "and Thomas Derrett, his surety on his claim bond, and Thomas Derrett, his surety on his *certiorari* bond," for the assessed value of the mare, or so much thereof as might be necessary for the satisfaction of the attachment debt, together with the costs of the claim suit.

All the above stated rulings of the court, and the rendition of judgment, are now assigned for error.

James W. Guinn, for the appellant:

1. The declarations of James Derrett were inadmissible: he was a competent witness, and ought to have been examined in person.—1 Stew. & P. 449; 8 S. & R. 124; 17 Ala. 10; Stark. Ev. 1731; 22 Ala. 529; 19 *ib.* 727; 22 *ib.* 631, 424.

2. The charge given was erroneous, as to the conclusiveness of the former verdict and judgment.—1 Green. Ev. 22; 1 Dev. & Bat. 464; 1 Saund. Pl. & Ev. 38; 6 Ala. 27; 9 Por. 397; 3 Dev. 508.

3. The satisfaction of the former judgment, by payment of the assessed value of the property, vests the title to the property in the defendant. Such is the law in trover and detinue, and there is no reason why the principle should not apply to a claim suit, which is but another mode of trial.

4. The judgment is erroneous.—Clay's Digest, p. 75, § 19; *ib.* 57, § 11; 3 Porter 289; *ib.* 406; 1 Ala. 77; 2 *ib.* 146; 20 *ib.* 694; 19 *ib.* 101; 16 *ib.* 272; 10 *ib.* 451; 18 *ib.* 778.

JOHN T. HEFLIN, with whom was S. F. RICE, *contra*:

1. The declarations of James Derrett, at the time the attachment was levied on the property in his possession, were admissible evidence as part of the *res gestæ*.—Perry v. Graham, 18 Ala. 522; Nelson v. Iverson, 17 *ib.* 216; Hadden v. Powell, *ib.* 314; Mobley v. Bilberry, *ib.* 428; McBryde v. Thompson, 8 *ib.* 650; Gary v. Terrell, 9 *ib.* 206; Thomas v. De Graffenreid, 17 *ib.* 602; Brazier & Co. v. Burt, 18 *ib.* 201; Pool v. Harrison, *ib.* 514.

2. The charge of the court was correct: the former trial of the same question, between the same parties, was conclusive. Rake's Adm'r v. Pope, 7 Ala. 161; Gardner v. Buckbee, 3 Cow. 120; Burt v. Sternburgh, 4 Cow. 559.

GOLDTHWAITE, J.—Whatever a party in the possession of property says, which tends to explain the act or character of his possession, is admissible as original evidence, being considered part of the *res gestæ*.—Beal v. Ledlow, 14 Ala. 527. Here the person in possession of the mare says, at the time the levy is made, that she was brought to his house by the defendant in attachment; and we must consider the declaration, in view of the circumstances under which it was made, as equivalent to saying that he did not hold the property as his own, but as bailee for the person who placed it in his possession; and under the rule we have referred to, it was properly admitted.

Neither was there any error in allowing the contents of the attachment to be proved. The loss was fully established, and whatever doubts may formerly have been entertained as to the admissibility of secondary evidence to establish a record in case of its loss or destruction, the doctrine is too well established at the present day to be questioned.—The Inhab. of Stockbridge v. The Inhab. of West Stockbridge, 12 Mass. 400; Donaldson v. Winter, 1 Miller's La. R. 136-145; Jackson v. Cullum, 2 Black. 228; Newcomb v. Drummond, 4 Leigh 57-60; Adams v. Betz, 1 Watts 427.

So, also, in relation to the rejection of the evidence which was offered on the part of the claimant to prove that the mare had died before the trial of the right before the justice. We have held, that the death of a slave pending an action of

detinue does not affect the right of recovery, (White v. Ross, 5 S. & P. 123; Bettis v. Taylor, 8 Por. 564; Bell v. Pharr, 7 Ala. 807), and the same rule must apply in trials of the right of property, where the thing levied on is destroyed, or dies, after the claim is put in.

We think it clear, also, that the former judgment, by which the mare was found subject to the levy of the other attachment, was conclusive evidence that she was subject in the present case. The levies were both made at the same time, and the parties and the issues were the same. The rule is, that an adjudication of a court of competent jurisdiction, between the same parties, on a particular point, is, as matter of evidence, conclusive upon such point.—3 Cow. & H. Notes to Ph. Ev. 828, and cases there cited; Rake v. Pope, 7 Ala. 161.

The charge requested by the claimant we understand to assert the proposition, that where two levies are made upon the same property, and a trial of the right is had in one of them, the property condemned, and its assessed value paid by the claimant, such payment can be set up as a complete defence on the subsequent trial. That an officer may levy two or more attachments or executions upon the same property, is undeniable; and it would be a great hardship, in many cases, if the claimant, on the failure to sustain his claim, should be subjected to pay the value of the property in every case in which it was levied on; and it is probable that a court of equity would, if it became impossible to restore the property from unavoidable accident, afford relief upon principles analogous to those which obtained in Garey v. Frost & Dickinson, 5 Ala. 636. But however this may be, we are satisfied that the payment of the assessed value of the property in one case, does not, of itself, sustain a claim set up in another.—The issue is simply, whether the property was subject to the execution at the time of the levy; and had the payment been made before then, we do not see how it could avail the claimant, unless it had the effect of divesting the title of the defendant in execution; and certainly the claimant could gain no right to the property, as against him, by the mere act of paying its value to the sheriff, and if he was not divested of the title, it would be subject to the execution, if in his possession, either actually or constructively, when the levy was

made. There was, therefore, no error in the refusal of the court to give the charge asked.

The judgment, however, which was rendered by the court upon the verdict, was incorrect in several respects. It should not have been rendered against the surety on the replevy bond, for the reason, that that bond has no connection with the proceedings on the claim. Indeed, it was irregular to allow a claim to be put in until the property replevied had been delivered to the officer according to the condition of the replevy bond (Braley v. Clark, 22 Ala. 361); and had the trial of the right of property been determined in favor of the claimant, it would not have discharged the surety on the replevy bond from his obligation.—Braley v. Clark, *supra*.—Neither was the court authorized to render an alternative judgment for the assessed value of the property against the surety on the *certiorari* bond. Under the fourth section of the act of 1816, Clay's Digest 315, in cases of appeal and *certiorari*, where the judgment of the justice is affirmed, it is rendered against the sureties on the bond; but it is evident from the language of the act, that it contemplated only those cases in which execution could issue from the appellate court. And as the right of property may be tried before the rendition of judgment on the attachment, and the main judgment upon such trial is the condemnation of the property to the judgment which has been or may be rendered on the attachment, we see no other course than to certify the judgment in the Circuit Court, with a *procedendo*, to the justice, who issues execution; and on the failure of the defendant in attachment to deliver the property, the officer endorses such failure on the claim bond, which is filed with the justice, and execution issues on it for the assessed value of the property, as fixed by the Circuit Court, against the principal and surety, if such value does not exceed the amount of the judgment in attachment and costs; and if exceeding that amount, then for the judgment and costs. We are aware that in Seaman v. White, 8 Ala. 656, it is intimated that the judgment on the trial of the right of property upon attachment is simply a condemnation of the property, without any assessment of its value; but the same necessity exists for ascertaining its value as in case of execution from courts of record, as required by the

third section of the act of 1828 (Clay's Digest, 213, § 64), and the attachment law (Clay's Digest, 57, 58, § 11,) expressly provides, that in case claim is made, and bond given for the trial of the right of any property levied on by attachment, the same proceedings shall be had as in case of the trial of the right of property levied on by execution,—that the property shall remain in possession of the claimant,—that the bond shall be lodged with the clerk, or justice, where the attachment is returnable; and should the condition of the bond be forfeited, the officer must enter the endorsement of forfeiture, and the clerk or justice shall issue execution on the same against all the obligors thereto. Under this statute, it seems to have been the intention of the Legislature to place the trial of the right of property upon attachments on the same footing as the trial upon executions; and the course we have adopted is the only one which will fully carry out the intention of the statute.

For the costs in the claim suit, however, as well as the costs on the trial of the right before the justice, execution can properly issue from the Circuit Court, and for these costs it is the duty of the court to give judgment, and award execution, as well against the sureties on the *certiorari* bond, as against the principal.—Clay's Digest, 315, §§ 11, 19.

It is urged for the appellant, that the condition of the *certiorari* bond in the present case was not such as to authorize a judgment against the surety; but there is nothing in this objection. There is no statute which prescribes the condition of a bond of this character; and in the present case it is broad enough to sustain a judgment for the costs, being, in effect, to pay and satisfy the judgment in the Circuit Court.

From what we have said, it is apparent that the judgment rendered by the Circuit Court should not have gone farther than a condemnation of the property to the satisfaction of the judgment on the attachment, and against the claimant and his sureties on the *certiorari* bond for the costs we have specified; and it would have been proper to award a *procedendo* to the justice. Under our practice, it is competent to correct errors of this character here, and to render the right judgment (Code, § 3034); which, as no motion was made to correct the judgment in the court below, must be done at the cost of the appellant who has brought the case to this court.

DeVENDAL *vs.* MALONE'S EXECUTORS.

1. Two foreclosure suits, pending in the same court, were consolidated by consent of counsel, and the second bill agreed to be taken as an answer and cross bill to the first; the first complainant admitted the validity of the second's mortgage, while the second alleged, on information and belief, that the first mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious: *Held*, that it was incumbent on the first complainant, as against the second, to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage; and that the evidence in the case was not sufficient to prove that the notes which he paid had been given in renewal of those embraced in the mortgage, although the mortgage provided for the renewal of the secured notes.
2. The want of registration of a mortgage can only avail in favor of a subsequent mortgagee, who purchased, *bona fide*, in ignorance of it; and if he sets up that defence, he must deny notice, whether charged in the bill or not.
3. When complainant has several times examined a defendant as a witness (once in chief, and twice on cross interrogatories) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time on the hearing.

APPEAL from the Chancery Court of Mobile.
Heard before the Hon. WADE KEYES.

THE case made by the pleadings in the record is substantially as follows: Thomas Malone filed his bill on the 14th December, 1849, against Henry Leitman and Charles Bingham, to foreclose two mortgages; one executed to himself on the 21st January, 1840, by them, for his indemnity and protection as their endorser of the following notes: three held by the Bank of Mobile, one of them for $906 20, due 18th April, 1840; another for $901 06, due 18th May, 1840, and the third for $905 90, due 18th June, 1840; also one note for $1285, due sixty days after 4th December, 1839, and one for $1000, due 2d February, 1840;—which mortgage also provided for the payment of $800, for which Malone held the due bill of the mortgagors, dated May 16th, 1839. The condition of this mortgage is, that the mortgagors pay the said promissory notes and due bill, "and all such notes as may from time to time be given on renewal thereof," &c. The other mortgage was executed to John B. Toulmin, agent of Toulmin, Hazard & Co.,

on the 3d day of March, 1838, for the same premises included in the deed to Malone, to secure the payment of a large sum, which, however, had, on the 12th June, 1845, been reduced by payments to $648 49, at which time, complainant avers, he purchased said mortgage, by paying for it that sum, and took the assignment of it by said Toulmin to himself.

The notes to the Mobile Bank were renewed and reduced by partial payments, until the demand originally due upon them amounted on the 11th December, 1841, to $2,373, for which the mortgagors then gave their note, with complainant as endorser, which complainant paid on the 12th February, 1842. One of the other notes, having been also renewed from time to time, was reduced to the sum of $547 20, which was in like manner renewed and endorsed, and paid by Malone on the 8th day of January, 1842. These payments, with the $800 due bill, and the balance paid on the Toulmin mortgage, are insisted upon by the bill as subsisting demands chargeable upon the mortgaged premises, and prayed to be paid to the complainant by a sale under a decree of foreclosure.

In January, 1850, Leitman answered the bill, admitting the execution of the mortgages and the indebtedness as charged; but insisting that the amount due, if anything, was very small, inasmuch as Bingham, his late partner, had obtained his written agreement, in 1842, for the rent to be paid to Malone, to be applied to the demand, and that the property had been managed by Bingham, the son-in-law of Malone, ever since that time; and he believed the rents had been received by him as agent of Malone, and accounted for. He further states, that a mortgage was executed on the same premises to Robertson, Beale & Co. for a large amount, which has been assigned by them to one Batre; that he and his said late partner, owing a number of debts, had applied for and obtained a discharge in bankruptcy, the certificate of which he exhibits with his answer; that the assignee in bankruptcy had never sold his equity of redemption, and that he (Leitman) disclaimed all interest in the suit.

On the 14th March, 1851, Malone having in the meantime departed this life, a bill of revivor was filed by Charles Bingham, Thomas King, and Thomas Malone, sr., executors of said complainant, by which, after setting forth the proceedings

had by the parties to the original suit, they aver that Bingham admits the complainant's right to the decree prayed for, and concedes the facts stated in the bill, and also pray that said Bingham's name be stricken out as one of the defendants to the bill, and that he be allowed, as one of the executors of Malone, to become a complainant. The bill of revivor also states, that DeVendal and Batre claim some interest in the mortgaged premises under a subsequent incumbrance, and prays that they may be made defendants to the original bill and bill of revivor, and that they answer the same, &c.

In January, 1850, DeVendal and Batre filed their bill in the same court to foreclose a mortgage upon the same premises, executed by Leitman & Bingham to Robertson & Co. on the 15th January, 1840, to secure the payment of certain notes due to the mortgagees, amounting to $5,273, which notes and mortgage were assigned by Robertson & Co. to Batre, and by Batre to one West, as trustee, for the benefit of his creditors. West having died, DeVendal was appointed trustee in his stead by the Chancery Court. Malone was made a party defendant to this bill, and the bill charges, on information and belief, that Malone's mortgage "was without any consideration, and that the indebtedness therein mentioned is wholly fictitious; that the object of said mortgage was, to hinder and delay creditors; that there are no such notes as described in said mortgage in the possession of any of the said defendants, or in existence; and for this reason, complainant is of opinion, that if ever such indebtedness existed between the parties, it had been paid or settled, and the lien of the mortgage thereby released." It also insists, that if such indebtedness ever existed, the rents and profits received by Bingham, the agent and son-in-law of Malone, who occupied a portion of the property and rented out the remainder, was amply sufficient to satisfy the same.

Malone answered this bill, admitting the execution of the mortgage, and the justness of the demands secured by it; reasserting the validity of his own mortgages as stated in his bill, and denying the agency of Bingham in taking possession or renting the mortgage premises for his benefit; also denying all fraud. Having died after filing his answer, a bill of revivor was filed, and the suit ordered to stand revived

against Bingham and King, as his executors. They answer the bill, denying the agency of Bingham, and re-asserting the validity of Malone's mortgages.

By an agreement between the counsel, the bill of DeVendal was allowed to stand as a cross bill and an answer to the bill of Malone.

A reference was made to the register to take an account of what was due to the complainants in each cause, and to consider and report what deductions should be made on account of payment of rents received by either party. He reported, giving the priority to the Malone mortgage, and ascertained that the sum of $4,440 15 was due thereon, being the amount of the $2,373 note due to the Mobile Bank, with interest, and excluded the other demands, as also the sum paid on the Toulmin mortgage, because Robertson & Co., the subsequent mortgagees, had no notice of that mortgage. He also reported the debt due, as secured by the Robertson & Co. mortgage, at $10,053 94, and charged Malone with the receipt of $115 rent, and interest thereon to 23d January, 1853, amounting to $110.

Both the parties filed exceptions to this report. Malone's executors, because, 1st, the Toulmin note and mortgage were excluded for want of registration, when the objection was not taken in the pleadings; 2d, for refusing to allow the $800 note described in the mortgage to Malone; 3d, because the master charged Malone with rent; 4th, the master erred in taking any notice of the claim of DeVendal; 5th, in failing to allow the claim of Malone as stated in the answer of Bingham. DeVendal excepted, 1st, because the master allowed the Malone mortgage as a charge on the premises; 2d, because he erred in giving it priority over DeVendal's; 3d, in allowing the $2,373 note and interest; 4th and 5th, in not charging Malone with greater rent; 6th, in holding that Malone had paid any of the debts of Leitman and Bingham, for which he was bound as endorser. Upon hearing these exceptions, the register overruled all those filed by Malone's executors, as well as those filed by DeVendal, except as to the rent, which he increased, charging Malone with three quarters, instead of one quarter.

An appeal having been taken to the chancellor from the

decision upon the exceptions by the master, the first exception, which objects to the exclusion of the notes and mortgage made to Toulmin, was sustained, and the other exceptions were held to be well determined by the master. Thereupon the court ordered the report to be corrected, which was accordingly done, and the amount due to the complainant in the original bill was set down at $6,140 61, less rents received $662 30, and the demand to DeVendal at $10,525 33; and a final decree was rendered upon the confirmation of this last report, giving Malone's mortgage the preference. To revise this decree the case is brought to this court, and the following errors are assigned:

1. The chancellor erred in sustaining Malone's first exception to the master's report.

2. In overruling DeVendal's first, second, third, fourth and sixth exceptions to the report.

3. In sustaining the master in the amount charged to Malone as rents.

4. In the re-reference to the master.

5. In the final decree declaring the priority of Malone's mortgage over DeVendal's.

6. In referring it to the master to decide upon the equities of the parties.

Jno. T. Taylor, for the appellant.
R. H. Smith, *contra*.

CHILTON, C. J.—The two cases having been consolidated by the consent of the respective counsel, and the bill of DeVendal, by their agreement, being taken as a cross bill and an answer, we must regard it, when considered as an answer, in the same light as we would an answer formally put in. But allowing the appellees the benefit of thus considering the cross bill, we think, that after applying to it the most stringent rules, it puts the complainants in the original bill upon proof of the consideration of their mortgage. The answer is, that these demands were unreal,—fictitious,—and that the mortgage to Malone was designed to delay, hinder and defraud creditors. On the other hand, Malone admits the demands secured by the mortgage to Robertson & Co. Under such circumstances, it was incumbent on the executors of

Malone to prove the *bona fides* and existence of the demands which constituted the consideration of the mortgage, and this was not done by the mere production of the notes specified in the mortgage. It has been several times held, that, as against a creditor, the consideration of a note which is impeached for fraud is not shown by the note itself, nor by the recitals in the deed of conveyance. These are but the written admissions of the debtor, which may be manufactured by him in furtherance of a contemplated fraud.—Nolen & Thompson v. The Heirs of Gwynn, 16 Ala. Rep. 725; McGintry *et al.* v. Reeves, 10 *ib.* 137; Pennington v. Woodall, 17 *ib.* 686; Falkner v. Leith & Jones, 15 *ib.* 9. We would not be understood as intimating that any attempt to make such evidence exists in the case before us; we allude to it merely as showing that the law cuts off the parties from such temptations, by giving to admissions of this character no weight except as sustained by proof *aliunde* of a valid consideration.

Applying the principle to the case before us, we feel constrained to hold, that the evidence is not sufficient to sustain the demand for money paid as surety of Leitman & Bingham by Malone. The proof fails to show that the notes last endorsed by him and paid had any connection with the notes embraced in the mortgage; and, although it may be quite plausible to say that Malone would not have endorsed a demand creating a new liability upon him for Leitman & Bingham, who had been discharged as bankrupts in 1842, and although the testimony of Greene shows that some notes of Leitman & Bingham, with Malone as endorser, were discounted in bank between the date of the notes described in the mortgage and the 11th December, 1841, when the note for $2,373 was executed, it fails to show any such demands due to the Bank as those described in the mortgage, nor does the Bank record furnish any evidence of such notes having belonged to it. This proof, therefore, utterly fails to show any connection between the note paid by Malone and those which are set out as the consideration of the mortgage.

Neither does the deposition of Leitman materially aid the complainant. He knows that the Bank held a note of Leitman & Bingham, which was payable to, and endorsed by, Malone; and to the best of his recollection, the note was

given upon renewal of notes made by the same parties, but he is unable to state the amounts or dates of any of the notes, or who paid the last named note; he *presumes* that Malone did. This proof is insufficient to establish the fact charged in the bill, that the $2,373 note was given upon a renewal of the demands due to the Bank, as shown in the mortgage, especially in opposition to the denial of the answer.

As to the Toulmin mortgage, the *bona fides* of the demands secured to be paid by it was not put in issue by the answer, or cross bill, and we think the proof as to that is sufficient. The objection to it, that it was never recorded, could only avail in favor of the subsequent mortgagee, if he purchased *bona fide*, in ignorance of it; and the rule requires that a subsequent purchaser or mortgagee, who seeks to shelter himself under this defence, must explicitly deny such notice, whether it be charged in the bill or not.—Story's Equity Pl. § 662; Gallatin v. Cunningham, 8 Cow. R. 361-374; Prec. in Chy. 226; 2 Pr. Wms. 491; 1 Johns. Ch. R. 302; 3 *ib.* 345. The want of notice is not relied upon in the pleadings, and it follows that the chancellor very properly held this mortgage to be a charge upon the property.

As to the $800 note, there is no evidence of its consideration, and under the rule first mentioned, it was properly rejected.

In regard to the rents, we are not prepared to say that the evidence shows that more should have been charged against Malone than the register charged against him. As, however, the case must go back to the register, we would not be considered as expressing an authoritative opinion upon this point.

As to the competency of Leitman as a witness: The order allowing his examination reserves no objection to be taken to his proof on the trial. This may have resulted from the fact, that the complainant had made him his witness. Be this as it may, we do not think it should be allowed the complainant, after having examined him in chief, and twice upon cross interrogatories, without raising any objection on the ground of interest, to spring that objection for the first time upon the trial. The obvious tendency of such practice would be, to take parties who were reposing upon such testimony by surprise.

For the errors above noticed, the decree of the chancellor must be reversed, and the cause remanded, to be referred back to the register to take an account in accordance with the views contained in this opinion.

BIRD *vs.* BOHANNON'S ADMINISTRATOR.

1. A claim allowed against an insolvent estate for money paid by mistake, under these facts: The creditor, as administrator of the estate of the decedent's father, paid to the decedent's trustee (she being then a married woman) the distributive share of one of her brothers, which was supposed by all the parties to have been assigned to her husband for her separate use, and was afterwards compelled to pay it again to her husband's administrator, upon proof that the assignment was to the husband in his own right, and not for the separate use of his wife.

APPEAL from the Court of Probate of Mobile.

THE appellant filed a claim for $600 against the estate of Nancy Bohannon, deceased, which had been reported insolvent; but the court disallowed the claim, under the following state of facts, as shown by the bill of exceptions: Mrs. Bohannon was the daughter of one Jesse Bass, and before her intermarriage with Bohannon had been the wife of one Peyton R. Prichard, who died insolvent. Her father died during the life-time of Prichard, leaving a considerable estate, and several children to inherit it, among whom were Barnabas Bass and Mrs. Bradberry. Barnabas Bass assigned all his interest in his father's estate to Prichard in his life-time.—Prichard died, and his widow married Bohannon before the final distribution of the estate of Jesse Bass deceased. Bohannon made a settlement of property on his wife, including the portion of Barnabas Bass in the estate of Jesse Bass deceased, and appointed in the deed of settlement George R. Evans trustee for Mrs. Bohannon. The appellant, William E. Bird, was administrator of Jesse Bass deceased, and made final settlement thereof after the deed of settlement made by Bohannon in which G. R. Evans was trustee. Evans claimed

the portion of Barnabas Bass in Jesse Bass' estate, amounting to $600, for Mrs. Bohannon, and Bird paid it to him, taking his receipt for it as trustee for Mrs. Bohannon; and Evans paid the money to Mrs. Bohannon. Up to this time, all the parties acted under the belief that the assignment of his interest in his father's estate made by Barnabas Bass to Prichard, was made to the latter for the sole and separate use of his wife, who was afterwards Mrs. Bohannon. After this payment by Bird to Evans, and by the latter to Mrs. Bohannon, Evans and Mrs. Bohannon both died, and the appellee became the administrator of the latter, and reported her estate insolvent. After the deaths of Mrs. Bohannon and Evans, one Minter, who was administrator of Peyton Prichard, claimed Barnabas Bass' interest in Jesse Bass' estate, and on showing that it had been assigned by Barnabas Bass to Prichard in his own right, and not for the benefit of his wife, as had been supposed, obtained a decree for it, amounting to $600, against Bird as administrator of Jesse Bass deceased, who paid the money on that decree; thus paying it twice, once to Evans for Mrs. Bohannon, and a second time to Minter, administrator of Prichard. Bird then made out and presented the account here in controversy against the estate of Mrs. Bohannon, and here assigns for error the decree of the Probate Court, rejecting his claim.

JNO. T. TAYLOR, for appellant.

C. P. ROBINSON, *contra.*

LIGON, J.—The sole question in this case is, whether the testimony is sufficient to authorize the allowance of the appellant's claim. We think it is. There can be no doubt that the money claimed was paid under a mistake of the rights of Mrs. Bohannon, and an ignorance of those of the administrator of Prichard, and this mistake was common to all the parties. Under such circumstances, Bird could have recovered the amount of Mrs. Bohannon in an action for money had and received; and as this is the case, the judge of probate should have allowed the claim on the settlement of her estate, which had been reported insolvent.

Let the decree be reversed, and the cause remanded.

AGEE & AGEE *vs.* MEDLOCK.

1. When the bill of exceptions, after setting out a charge requested by the defendant, concludes with these words: "which charge the court refused, and *the defendant excepted*," the exception applies only to the refusal to charge as asked, and cannot be extended to charges previously given.
2. A plea, averring that plaintiff was not, at the commencement of the suit, the legal owner of the note sued on, only puts in issue the genuineness of the endorsement, and must be verified by affidavit.
3. The holder of a note endorsed in blank may fill it up with any name he pleases.
4. In *assumpsit* by the endorsee of a promissory note, the fact that plaintiff is not the owner of the note is not a good defence under the general issue.
5. When issue is joined on several pleas, one of which presents an immaterial issue, if the evidence sustains that plea, the defendant is not entitled to a general verdict.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. LYMAN GIBBONS.

ASSUMPSIT by "Eliza Medlock, endorsee," against the appellants, on a promissory note for $540, executed by Agee, Dumas & Co., of which firm the appellants were partners, payable to Lucius Medlock, or bearer, for value received. The defendants pleaded, 1st, *non assumpsit;* 2d, payment; 3d, set-off; 4th, the statute of limitations of six years; 5th, that plaintiff was not, at the commencement of the suit, the legal owner of the note sued on; 6th, that plaintiff is not the owner of the note sued on, and was not at the commencement of the suit, but one Moses Medlock is the true owner of the same, and defendants have off-sets against him."

On the trial, after the plaintiff had read in evidence the note sued on, with the endorsement thereon, the defendants introduced evidence tending to show that the name of Eliza Medlock was inserted over the name of the endorser but a short time before the commencement of the suit; and then read in evidence the deposition of Lucius Medlock, the payee of the note, who testified, that he was the brother of said Eliza Medlock, and the son of said Moses Medlock; that the note was given for money loaned to said firm by himself and

his father, about $240 belonging to witness, and the residue ($300) being advanced by his father; that the note was made payable to him at the request of his father, who was insolvent; that his father urged him to collect the whole amount of the note, but he refused to do so, because he had learned that there were unsettled accounts between his father and Agee, Dumas & Co.; that he collected his interest in the note, and afterwards endorsed it to his father by writing his name across the back of it.

"The court charged the jury, that, if they believed the note sued on was the property of Moses Medlock, and that the defendants had off-sets against him, such off-sets might be allowed to the extent they had been proven. Further, that, if they believed the note, at any time after it was due, became the property of Moses Medlock, then the law gave the defendants the right to set off any claim which they then had against him, and that right would pass, with the note, in the hands of any subsequent holder thereof, and existed in the hands of the present plaintiff. The defendants then asked the court to charge the jury, that, if they believed from the evidence that the note sued on was, at the commencement of the suit, the property of said Moses Medlock, and that Eliza Medlock was not the real owner, then the plaintiff could not recover in this suit; which charge the court refused, and the defendants excepted."

The appellants now assign for error, 1st, the charge given by the court, and, 2d, the refusal to charge as requested.

R. C. Torrey, for the appellants, contended that, as none of the pleas were demurred to, but issue joined on all of them, and as the evidence clearly established that the plaintiff was not the owner of the note sued on, the court could not withdraw that issue from the jury, and should have given the charge requested. He cited the following authorities:—Hazzard v. Purdom, 3 Porter 43; Pitts v. Keyser, 1 Stew. 155; Johnson v. English, *ib.* 169; Alday & Evans v. Jemison, 3 Porter 112; Bryant v. Owen, 1 *ib.* 203; Buttock v. Ogden, 13 Ala. 347; Hunt v. Stewart, 7 *ib.* 525; Birch v. Tillotson, 16 *ib.* 387; Bryant v. Owen, 2 Stew. & Por. 134; Stocking v. Toulmin, 3 *ib.* 35; Sykes v. Lewis, 17 Ala. 261; 8 Port. 142;

Bancroft v. Paine, 15 Ala. 838; 3 U. S. Dig., p. 298, § 1036; 5 *ib.* 651, §§ 1130 to 1133.

WATTS, JUDGE & JACKSON, *contra*, insisted that the charge asked was properly refused, because it proposed what, under our statute and decisions, cannot be done without a sworn plea, whether demurred to or not; citing Beal & Bennet v. Snedicor, 8 Porter 523; 9 *ib.* 309; McWhorter v. Lewis, 4 Ala. 188; Riggs v. Andrews & Co., 8 *ib.* 628; Sawyer's Adm'r v. Patterson, 11 *ib.* 524; 3 *ib.* 326; Lazarus v. Shearer, 2 *ib.* 718; Fowlkes & Co. v. Baldwin, Kent & Co., 2 *ib.* 705; Bragg v. Nall, 14 *ib.* 629; Dew v. Garner, 7 Porter 503; Tarver v. Nance, 5 *ib.* 712.

GOLDTHWAITE, J.—We can only consider the questions presented upon the refusal of the court to give the charge requested by the appellants, as the exception taken applies to the action of the court on that point alone.—Andrews v. Broughton, 21 Ala. 200; Croft v. Ferrell, 21 *ib.* 351; Sammis v. Johnson, 22 *ib.* 690. The plea that the plaintiff was not, at the commencement of the action, the legal owner of the note sued on, was defective, under our decisions, for want of the affidavit required by the statute (Beal v. Snedicor, 8 Porter 523; Jennings v. Cummings, 9 *ib.* 309; Frazer v. Brownrigg, 10 Ala. 817); and the effect of these decisions seems to be, that such a plea only puts in issue the genuineness of the endorsement (Frazer v. Brownrigg, *supra*); and if so, it is disproved, when that fact is established. Here the endorsement of the note was fully proved. It was, it is true, made by the payee of the note in blank; but the effect of such an endorsement is, to authorize the holder to fill it up with any name he pleases.—Cope v. Daniel, 9 Dana 415; Kennon v. McRae, 7 Port. 175; Olcott v. Rathbone, 5 Wend. 494. As the *fact* of the endorsement was fully proved, and as the charge requested went, not to that fact, but to a matter independent of it, the argument of the counsel for the appellant, based upon the assumption that the evidence sustained the plea, fails, if the plea itself went no farther than to put in issue the genuineness of the endorsement.

Without reference, however, to the plea, the question is

presented, whether, notwithstanding the endorsement, if the plaintiff was not the owner of the note sued on, that fact would not be a good defence under the general issue. The reasoning of the judge who delivered the opinion in Bryant v. Owen, 2 S. & P. 134, is certainly in favor of the position; but we think that the cases to which we have referred in the former part of the opinion, which limit the effect of such a plea when pleaded specially to the act of the assignment only, virtually overrule this decision. When the possession of the note is not *mala fide*, and the only question is as to the right of the party suing to maintain the action, all that is necessary to prove is that the plaintiff has the legal title. The defendant is not deprived of any defence he may have against the real owner (Bowen v. Snell, 9 Ala. 481; Frazer v. Brownrigg, *supra*); and there is, on principle, no objection to a suit on a promissory note, on the ground that the plaintiff has no interest in it.—Gage v. Kendall, 15 Wend. 640; Guernsey v. Burns, 25 *ib.* 411; Aspinwall v. Meyer, 2 Sandf. Sup. Ct. R. 180; Brown v. Clark, 14 Penn. (2 Har.) 469. It was upon this principle that in Moore v. Penn, 5 Ala. 135, it was held inadmissible to show, that one for whose use a suit was brought had no interest in the note, unless it became necessary to prove some defence as against the actual owner.

It follows from what we have said, that the plea was bad, because, conceding for the sake of the argument that its effect was to put in issue the ownership of the note, such an issue would have been an immaterial one; and the rule established in Cullum v. The Bank, 4 Ala. 22, is, that if the evidence sustains such an issue, and other pleas are pleaded upon which issue is also taken, the defendant is not entitled to a general verdict.

In no aspect of the case can we perceive any error.

Judgment affirmed.

VANZANT ET AL. *vs.* MORRIS.

1. A bequest to A "and his children," when A has no children either at the time the will is made, or when it takes effect by the testator's death, vests the absolute property in A; but where there is a specific bequest of slaves, with the addition of these words, to each one of the testator's children, some of whom are unmarried at the time the will is made and also at the testator's death, while others are married and have children living, and the vesting in possession is postponed until a future uncertain period, (as the death or marriage of the widow,) the children living when the property falls into possession take jointly with their parent.
2. The surviving brothers and sisters of a deceased infant, may recover, in equity, a legacy bequeathed to them jointly with him, without administration on his estate, when there are no debts against it.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. E. D. TOWNES.

THIS bill was filed to recover several slaves which complainants claimed under the will of their grandfather, John Wilhite, while the defendant claimed as purchaser under complainants' father and mother. The will of said Wilhite contains the following clauses:

"Item 3d. I give my wife Mary five hundred dollars of my ready paper money, that she may live comfortably, and assist in raising the four younger children and schooling them; also four head of horses, Selim, Tarleton, a sorrel and a roan filley, with all the farming utensils, with the wagon and gearing; also, all the hogs, and ten head of sheep, six cows and calves, and oxen; also, she must retain all the negroes, unless there should be two more of the blacks, then, in that case, she shall keep Prudence and Hannah, and the rest shall be given to the heirs as I shall hereafter direct; for sweetly we have labored together for it, and it is my desire she should enjoy it during her life or widowhood.

"Item 4th. My daughter Margaret, I bequeath to her and her children my slave Hannah, unless there is a slave born of my stock; in that case, shall have it, and give up Hannah, as above directed.

"Item 5th. I give to my son James B. Wilhite and his children my slave Ransom.

"Item 6th. I give to my son John P. Wilhite and his children my slave Elvira.

"Item 7th. I give to my son Jackson W. Wilhite and his children my slave Prudence, unless there is a second slave born in my stock; in that case, he shall have it, and give up Prudence, as above directed.

"Item 8th. I give my son Claiborne L. Wilhite and his children my slave Jerry. These five eldest have received one hundred dollars in their horses and rigging.

"Item 9th. I give to my son Alfred M. Wilhite and his children my slave Sam and one hundred dollars in a horse and rigging out of the sales.

"Item 10th. I give to my son Wiley W. Wilhite and his children my slave Henry and one hundred dollars in a horse and rigging out of the sales.

"Item 11th. I give to my daughter Patsy C. Wilhite and her children my slave Nance and two hundred dollars of my ready hard money.

"Item 12th. I give to my son Calvin B. Wilhite and his children my slave Andy and one quarter-section of land, viz., (describing it,) and three hundred dollars of my ready hard money.

"Item 13th. It is my desire that my wife, Mary Wilhite, live on the land that I give to my son Calvin B. Wilhite, during her natural life or widowhood; if there should be two slave children born of my blacks, then, at that time, the negroes to be given up to the heirs, as I have directed.

"Item 14th. It is my desire, if my widow do marry, the negroes shall be given to the heirs, as I have directed; and if there is only one slave born, Hannah shall be sold; if two slave children, Prudence shall be sold also, with all the rest of the property, and the money divided equally with the heirs; and if my widow do not marry, she is to retain all the negroes and property her natural life. N. B. When there is two slaves born, then the young negroes shall be divided with the heirs; if there is not two, the widow must retain all until her marriage, and if she does not marry, she shall retain all during her natural life."

The complainants, who are the surviving children of the testator's daughter Margaret, mentioned in the fourth clause of the will, allege that they and their deceased brother, James Vanzant, who died when about seven years of age, were living at the death of their said grandfather, and that they are entitled jointly with their mother to the slave Hannah and her increase; that their father and mother took said slave under the provisions of said will, and sold her to one Mary Lockhart, or Mary Wilhite, by whom she was sold to the defendant. The defendant, in his answer, admits all the allegations of the bill, but denies that the complainants have any right, title or interest whatever in the slaves bequeathed by said will to their mother; and he insists that, under the provisions of said will, the entire and absolute property in said slave Hannah vested in said Margaret, and passed with the possession to her husband, who thereby acquired an absolute right which he afterwards conveyed to defendant's vendor.— It appears that, at the time said will was made, said Margaret was married, and had children then living, while her brothers and sisters, except James B. Wilhite, were unmarried, and some of them not more than eight or ten years of age; and at the testator's death, said John P. and Jackson W. were also married, but said Margaret was the only legatee who had children.

The chancellor dismissed the bill, holding that the words "children" and "heirs," as used in the will, were convertible terms; that the bequest to said Margaret "*and her children*" meant a bequest to her *and her heirs*, and therefore vested the absolute property in her, which her husband, by virtue of his marital rights, could dispose of. The decree of the chancellor is now assigned for error.

William Cooper, for the appellants, contended, 1st, that the plain reading of the clause, by itself, was a bequest to Margaret and her children jointly, and that this construction was not changed by a consideration of the other clauses of the will; that the construction held by the chancellor was unwarranted, because it inferred that the testator had fixed a time to die before the birth of his grandchildren, which would be a strange proposition, especially when he spoke of

slaves likely to be born before his own death; that the testator's intention doubtless was, to give Hannah and her increase to his daughter and her children, separate and apart from her husband, she being then a married woman with children; that the falure to create the separate estate did not affect that part of the intention which was legally expressed, —did not destroy the joint interest of the daughter and her children living at her death, even if the bequest failed as to the children then unborn. He cited the following cases: Fellows, Wadsworth & Co. v. Tann, 9 Ala. 1003; Spear v. Walkley, 10 *ib.* 328; Jasper & Maclin v. Howard, 12 *ib.* 652; Nimmo v. Stewart, 21 *ib.* 682; Cook & Mitchell v. Lewis, 16 *ib.* 70; Rugely & Harrison v. Robinson, 10 *ib.* 737.

2. That, under the rule in equity, there was no necessity for administration on the estate of the deceased infant child of said Margaret.—Miller v. Eatman, 11 Ala. 614; Vandeveer v. Alston, 16 *ib.* 494; Frowner v. Johnson, 20 *ib.* 483; Bethea v. McCall, 5 *ib.* 315.

THOMAS M. PETERS, with whom was P. L. LIGON, *contra*:

1. In construing wills, the court is bound to find out the intention of the testator, and effectuate this intention. In doing this, the whole will is to be looked to, and the intention is not to be inferred from detached phrases; and subsequent words and clauses must prevail over antecedent ones. Capal's Heirs v. McMillan, 8 Port. 197; Leavens v. Butler, 8 *ib.* 380; Stallsworth v. Stallsworth, 5 Ala. 143.

2. Besides; trying the meaning of words and phrases in a will, the court may look at all the circumstances, in which it might be called upon to determine the meaning of the same words and phrases when applied to a different state of facts. Wills v. Sayer, 4 Madd.; 2 Atk. 465; Hearle v. Greenbank, 3 Atk. 714; Arnold v. Chapman, 1 Ves. 108; 1 *ib.* 44.

3. And when words and phrases occur twice in the same instrument, they are to receive but one meaning in both places, unless a clear intention to the contrary is apparent.—Ridgway v. Munkittrick, 1 Dru. & War. R. 85.

4. When a bequest is to one "and her children," and there are no children at the date of the will, or at the death of the testator, unless the estate is limited to a life estate in the first

taker, the estate is given to the mother alone, exclusive of children.—Jenkins v. Freyer, 4 Paige 47 ; 2 Jarman on Wills, 75 ; Nimmo v. Stewart, 21 Ala. 682 ; Shearman v. Angel, 1 Bail. Eq. 351; 4 Eq. Dig. 342, § 9.

3. Apply these well-settled principles to the construction of this will, and it seems evident that the word "children," in the fourth clause, as well as in the others, was used synonymously with the word "heirs," as a word of limitation merely, and not for the purpose of including the testator's grandchildren, born and to be born, among his legatees. For it appears from the will itself, that it was made and published in contemplation of a speedy dissolution, when the testator "did not expect to live long,"—that he then had "five" older and "four" younger children, the latter of whom were minors yet to be raised and educated ; and therefore not likely to have children then or at the death of the testator. And the testimony and admissions show, that none of the nine legatees (excluding the widow) had or have children, except Margaret. The complainants' construction of the phraseology of the will is without application as to any of the legatees save Margaret ; yet it is the same in all the clauses, where the legatee is specified by name ; and unless the word "children" is construed as a word of limitation merely, in eight out of the nine cases in which it occurs, it has no application or meaning under the circumstances of this case; and otherwise the testator's grandchildren, born and to be born, would become legatees under the thirteenth clause of the will, upon the happening of the contingencies referred to in that clause. For the testator there uses the word "heirs" as a convertible term for legatees ; and upon the happening of the second contingency mentioned in that clause, he directs his property to be sold, and the money to be "divided equally" "with the heirs." This direction could only be made consonant with the antecedent dispositions of the will, by making the word "heirs" refer exclusively to his own children, as under our law it legitimately does (5 Ala. 158–164). Again ; it appears from the several clauses of the will, that the testator intended to make an equal distribution of his estate among his own children. In the fourteenth clause this is expressly declared. But if the word "children" in the fourth

clause is not construed as a word of limitation, this intention, as to Margaret, will be wholly defeated, and she will get but one-fifth part as much as her brothers and sisters,—a legacy for each of her four children being carved out of her portion. This certainly was never the testator's intention, and does not harmonize with the phraseology used in the subsequent part of the fourth clause of the will itself; for there, upon the happening of the event referred to, the testator gives the legacy to Margaret alone, without any mention of her children at all. Thus it will be seen that the defendant's construction makes the will harmonize in all its parts, gives meaning and application to its phraseology, and effectuates the evident and expressed intention of the testator to divide his estate "equally" among his own children—"the heirs."—Erwin, adm'r, v. Ferguson, 5 Ala. 158–164.

7. Nimmo v. Stewart, Wilde's Case, and others like them, relied on by complainants as militating against the defendant's construction, are really quite different. In these cases the manner of the gift, and the words used to convey the testator's meaning, are such as show that the testator had both the child and grandchild in his mind at the time as things of substance, and this is kept up throughout the whole. But here it is quite otherwise, and it is apparent that the word "children" is used as a mere matter of form, and is always dropped whenever the testator varies the bequest to suit some supposed contingency. This is particularly the case in the fourth clause.

CHILTON, C. J.—The question whether the property in controversy belongs to the complainants or to the defendant, depends upon the construction to be placed by us on the following clause in the will of the late John Wilhite, namely: "Item 4th. My daughter Margaret, I bequeath to her and her children my slave Hannah, unless there is a slave born of my stock; in that case, shall have it, and give up Hannah, as above directed." The clause referred to by the expression "above directed," is a portion of the preceding item, in which, after giving to his wife certain property, the testator says, "she (his wife) must retain all the negroes, unless there should be two more of the blacks; then, in that case, she

shall keep Prudence and Hannah, and the rest shall be given to the heirs, as I shall hereinafter direct; for sweetly we have labored together for it, and it is my desire that she should enjoy it during her life or widowhood."

By other clauses in the same will the testator makes several other bequests to his children, in which he uses language similar to that employed in the bequest to his daughter Margaret; for example—"To James B. Wilhite *and his children* my slave Ransom"; "To John P. Wilhite *and his children* my slave Elvira"; "To my son Jackson W. Wilhite *and his children* my slave Prudence, unless there is a second slave born in my stock; in that case, he shall have it, and give up Prudence, as above directed"; "To Claiborne L. Wilhite (another son) *and his children*," the testator gives his slave Jerry, and adds: "These five oldest have received one hundred dollars each in their horses and rigging"; "To Alfred M. Wilhite *and his children*" the testator gives his "slave Sam, and one hundred dollars in a horse and rigging to come out of the sales;" a similar bequest to Wiley W. of slave Henry; to his daughter Patsy C. and her children he gives Nance, a slave, "and two hundred dollars of his ready hard money." The testator then proceeds to fix periods when the slaves shall be delivered up to "the heirs," as he has "above directed."

It is quite manifest from an examination of this will, that the testator regarded the terms "heirs" and "children" as convertible and equivalent expressions. The property which he bequeathes to his own children, he desires should be delivered over to "his heirs," &c., and in every instance the gift to them is to each "*and his*" or "*her children.*" The will is so inartificially drawn, that portions of it are almost inexplicable; but it is our duty, from an examination of the whole of it, to arrive at the testator's intention.

The chancellor, by the decree in the record, is made to say, that "It is well settled that the word 'children' is, in general, a word of limitation, and not of purchase." This is doubtless a clerical misprision, for otherwise it would be at war with his conclusion, which immediately follows, where he says that a "bequest to a person, and to his or her children, vests the property jointly in the parent and children." But whether the premise be correctly stated or not, makes no

difference : the *conclusion* is right, and it is with *this* we have to do.

There can be no doubt that a testator by his will can limit property, whether real or personal, to one and to his children then born ; but a bequest to A and his children, if A has no children either at the time the will was made, or when it takes effect by the death of the testator, never has been held to create any interest in after-born children *as purchasers.*— The term "children," in such case, is a word of limitation, and not of purchase. So, in Wilde's Case, 6 Coke's R. 17 a, it was resolved by the judges, that if " A devises his lands to B and to his children or issues, and he hath not any issue at the time of his devise, that the same is an estate tail ; for the intent of the devisor is manifest and certain, that his children or issue should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate ; therefore, there such words shall be taken as words of limitation, namely, as much as children or issue of his body." In relation to the doctrine of this case, and the cases founded on it, Downes, C. J., in 1 Ball & Beatty 459, says the following propositions may be considered as settled by them: " Where the devise is in terms immediate, and so intended by the testator, and the description of the person to take is general, there, none that do not fall within the description at the time of the testator's death can take ; therefore, the after-born must be excluded ; but, where the enjoyment of the thing devised is, by the testator's expressed intent, not to be immediate by those among whom it is finally to be divided, but is postponed to a particular period, or until a particular event shall happen, then those who answer the general description at that period, or when the event happens on which the distribution is to be made, are entitled to take."

These authorities, and a number of others which might be cited, very clearly show, that the chancellor was right, in saying that the bequest to the several legatees who had no children before or at the time the will took effect, vested in them the absolute property in the slaves and other property bequeathed.—Davie v. Stephens, Doug. R. 306 ; Powell on Devises, vol. 2, pp. 494 to 502.

But it by no means follows that the testator used the term "children" as a word of limitation, from the fact that there may not, at the time of making his will, have been any children born of several of the legatees. There are several clauses in his will, from which it would appear that he fixed upon a future event upon which the slaves were to vest in possession of the legatees. In the fifth item the testator says, it is his desire that the widow should enjoy the property during her life or widowhood. In the thirteenth item he desires his wife to retain the land which he had given to Calvin B. and his children, during her natural life or widowhood; and he adds, "if there should be two slave children born of my blacks, then, at that time, the negroes to be given up to the heirs, as I have directed." In the next and last item, immediately succeeding the above quotation, he says: "Item 14th. It is my desire, if my widow do marry, the negroes shall be given up to the heirs, as I have directed; and if there is one slave only born, Hannah shall be sold; if two slave children, Prudence shall be sold also, with all the rest of the property, and the money divided equally with the heirs; and if my widow do not marry, she is to retain all the negroes and property during her natural life. N. B. When there are two slaves born, then the young negroes shall be divided with the heirs; if there is not two, the widow must retain all until her marriage, and if she does not marry, she shall retain all during her natural life."

The concluding clause seems, when taken in connection with other provisions, clearly to indicate the intention of the testator to allow his widow to keep the negroes during her life or widowhood. This provision for her, from the oft-repeated allusions to it, shows that it was his leading intention to postpone for her benefit the possession of his other legatees; and if there were other clauses in the will repugnant to it, as it comes last, they must give way.

As, then, the will looks to a future uncertain period, when the property bequeathed shall vest in possession, it cannot be said with legal accuracy that the testator did not mean what he said when he used the term "children"; for by the time the property should vest in possession, each of the legatees might have had children. At all events, there was a possi-

bility of issue, and this is sufficient for the present argument. We do not, therefore, think that the testator used the term "children" in any of his bequests as a word of limitation.—He intended, if there were children when the property fell into possession, for them to take a joint interest with their parent.—2 Powell on Devises, 303; 2 Mod. 104; 1 Ves. 111.

So far as I have been enabled to trace the authorities, the term "children" has uniformly been construed in its natural, common-law import, unless in cases where departures have been indulged by courts astute to carry out the supposed intention of the testator, and to prevent a total failure of the bequest in favor of the children. In Buffar v. Bradford, 2 Atk. 220, Lord Hardwicke said: "It must be allowed that 'children,' in their natural import, are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way.*" See, also, Hatterly v. Jackson, 2 Str. 1172.

In respect to the particular clause under consideration, this reasoning would be inapplicable, as here the daughter had children when the will was made, and when the property, by its terms, vested in possession, and there is no reason why the intent to give an interest to the children jointly with the daughter should not prevail.—Keyes on Chattels, § 227. We have alluded to the terms employed in other portions of the will, because they are urged, and we think properly, as exponents of this, it being improbable that the same words, occurring in like connection, and apparently intended to accomplish similar objects, should have been intended by the testator to be understood differently.

We concede, that there is some force in the argument, that as the child to be substituted in lieu of Hannah, should one be born, should go to the daughter individually, we should the more readily construe the words giving Hannah as conveying the entire property to the daughter: but we do not think this sufficient to control the express and direct gift to the children, who were *in esse* and capable of taking. We cannot undertake to say that the testator might not have meant to give the woman to the daughter and her children, and the child to the daughter only. Nor will we forestall the inquiry, whether, amid the use of such a jargon of inapt

expressions, the testator did not intend that the children should share with the parent a joint interest in the child to be substituted in lieu of Hannah, in the event of the birth of one. Be this as it may, it should not be allowed to defeat the plain gift to the mother and children. They took a joint interest in the slave Hannah and her increase. Such, we apprehend, is substantially the rule to be gathered from several of our own decisions, which bear more or less directly upon this point.—Nimmo v. Stewart, 21 Ala. 682; Cook & Mitchell v. Lewis, 16 *ib.* 68; Fellows *et al.* v. Tann, 9 *ib.* 999; Jasper & Maclin v. Howard, trustee, 12 *ib.* 652; Rugeley *et al.* v. Robinson, 10 *ib.* 737.

As respects the interest of the deceased infant child of the testator's daughter, several decisions of this court show, that in a proceeding of this character, there being no debts chargeable on the property, there is no need of an administration.—16 Ala. 494; 20 *ib.* 482; 5 *ib.* 315; 11 *ib.* 614.

Our conclusion is, that the decree of the chancellor is erroneous. It must therefore be reversed, and the cause must be remanded, that a decree may be rendered in conformity to the views above expressed.

WARING & CO. *vs.* GILBERT & BRO.

1. The motion docket is no part of the records proper of the court; and if the clerk, in making out a transcript, copies into it entries on the motion docket, which have not been made a part of the record by motion to enroll or by bill of exceptions, they will be stricken out on motion.
2. In an appeal case, the Circuit Court may render judgment for a larger sum than was allowed by the magistrate.
3. A judgment of the Circuit Court, rendered on an award, affirmed on error, because the record did not affirmatively show that the award was obnoxious to the objections urged against it.

APPEAL from the Circuit Court of Mobile.
Tried before the Hon. JOHN A. CUTHBERT.

GILBERT & BRO. recovered a judgment against Waring & Co., before a justice of the peace, for $15 60, from which the

defendants appealed to the Circuit Court, where the plaintiffs filed a statement claiming $23, at the return term of the appeal in November, 1850. At the same term an order was made, by consent, referring the case to arbitration, but the names of the arbitrators were left blank. The case seems to have been regularly continued until the Spring term, 1853, when an award was made by three persons, who style themselves arbitrators, reciting that the parties had appeared before them, after having chosen two of their number as arbitrators, and given them power to choose an umpire in case of their disagreement; that they had disagreed, and thereupon they had chosen the third as umpire; that the umpire and one of the arbitrators agreed to the award, which was subsequently subscribed by all of them. The award was in favor of Gilbert & Bro., for $23 45, with costs of suit; and judgment was accordingly rendered against Waring & Co. for that amount, with costs. The judgment entry recites the reference and award, and proceeds: "Came the parties by their attorneys; and said award being read to the court, it is considered," &c. The record does not show that any exceptions were taken to the award, nor that any objection was made to the judgment; but it contains a judgment overruling a motion to set aside the award, which was made after the judgment had been rendered.

Waring & Co. now assign for error, 1st, that the court erred in rendering judgment for a greater sum than that recovered before the justice of the peace; 2d, in rendering judgment on the award; 3d, that the persons by whom the award was made were never chosen as arbitrators by the parties; 4th, that no authority was ever given to the umpire to act; 5th, that there was no valid order of reference: 6th, that the court erred in overruling the motion to set aside the award.

A motion was made by the counsel of the appellees, before the cause was argued on the merits, to strike out certain portions of the record, which were transcribed by the clerk from the motion docket; in response to which motion the opinion by the Chief Justice was delivered.

Geo. N. Stewart, for the appellants.

Wm. G. Jones, *contra.*

CHILTON, C. J.—A motion is made in this case, to strike from the record that portion of it which appears to have been copied from the motion docket by the clerk, and which is a transcript of a motion made by the counsel for the defendants in error to set aside the award which had been made, and stating the reasons upon which it was predicated. Although we see no injury which can result to the plaintiff from its insertion, inasmuch as the motion is fully set out in the entry overruling it, yet, as a matter of practice, it is proper we decide upon it.

The motion docket is no part of the records, properly so called, of the court; and if a motion is spread upon it, which either party desires should be made a part of the record proper, it must be done upon motion to have it enrolled as a matter of record, or by bill of exceptions, which is the usual form. The clerk, in making out the transcript, has no authority to transcribe the entries upon the motion docket, unless they have in some way been made a part of the record; and if he does copy them into the transcript, this court will order them to be stricken out.

The motion is granted.

LIGON, J.—1. There is no error in that part of the record to which the first assignment relates. We have already held, that, in cases of appeal from the judgments of justices of the peace, the Circuit Court may give judgment for any sum which may be found due on the trial *de novo* required by the statute to be had in such cases, unless the defendant pleads to the jurisdiction.—Vaughan v. Robinson, 20 Ala. Rep. 229; Crabtree v. Cliatt, 22 *ib.* 181. In the absence of such plea, the Circuit Court is considered as acting upon its original jurisdiction, by consent of parties, unless, upon the face of the papers sent up, the want of jurisdiction in the justice is made to appear.—Crabtree v. Cliatt, *supra;* Wyatt v. Judge, 7 Por. 37; Vaughan v. Robinson, *supra.*

2. In relation to the other assignments of error, there is nothing in the record to sustain them. All that appears is, a blank order to refer the case, the award of certain persons claiming to be arbitrators, the judgment of the court in pursuance thereto, rendered without objection, both parties being

in court at the time of its rendition, and a subsequent judgment of the court refusing to set aside the award on the motion of the defendants. The record gives no *data* upon which we can say the court erred in overruling the motion to set aside the award. There is no proof to show that it was obnoxious to the objections taken to it by the defendants; and in the absence of such proof, we cannot presume against the correctness of the judgment. The presumption is in favor of, and not against, the judgments of the Circuit Courts, and it is the duty of the party complaining of error to show that it exists. This is not done here, and it does not appear but that the court had the fullest parol evidence that the persons assuming to act as arbitrators had the amplest powers from the parties so to act; and that they performed their duties with the strictest propriety, impartiality and fidelity.

Let the judgment be affirmed.

COOPER *vs.* MACLIN'S HEIRS.

1. When the appellees are infants, who sued by their next friend, the appeal bond (§ 3018) should be made payable to them, and not to their next friend.
2. The failure on the part of the appellant to apply for a citation to the appellee, does not affect the validity of the appeal; the appellee may avoid delay by appearing.
3. One surety to an appeal bond (§ 3041) is sufficient.
4. An appeal will not be dismissed because the record shows that a writ of error was sued out on the judgment, when it does not appear that any transcript was filed at the term to which the writ was returnable, and the judgment has not been affirmed.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. GEO. D. SHORTRIDGE.

MOTION to dismiss the appeal.

JOHN T. MORGAN, for the motion.

WHITE & PARSONS, *contra.*

GOLDTHWAITE, J.—In this case, the judgment in the court below was rendered in favor of the appellees, who were infants suing by their next friend, Elizabeth Spencer. The appeal was taken by the defendant, who gave bond payable to the plaintiffs in the judgment, the name of the next friend not appearing in the bond; and a motion is now made to dismiss the appeal on this ground. By section 3016 of the Code, the right of appeal on a final judgment is secured to either party; and by section 3018, it is provided, that the appeal shall not operate as a *supersedeas*, unless bond be given in double the amount of the judgment, payable to the appellee, with sufficient sureties, and with condition to prosecute the appeal to effect and satisfy such judgment as the Supreme Court may render in the premises. In the present case, the defendants in the court below were the appellees. The next friend is not, strictly speaking, a party to the cause. The infants sue by him, and his name is placed upon the record in order that the court may have some person before it who is responsible for the cost and conduct of the case.—Hanna v. Riddle, at the present term. The bond was properly made payable to the appellees, and there was no necessity for naming the next friend in it.

Another ground on which the dismissal of the appeal is urged, is, that no citation was issued under section 3018. This section supposes that the taking of the appeal would probably be known to the appellee, and it is in his power to avoid any delay by appearing. The citation is not necessary to the appeal, and the mere failure to make application for it does not affect its validity.

It is also urged, that section 3041 requires more than one surety to the appeal bond; but we do not so understand it. It is true that the plural is used, but under the rules of construction (found in the first section) the plural includes the singular. There may be some cases, where the law, for good reasons, requires at least two sureties, as on the bonds of executors and administrators, and undertakings of bail in criminal cases; and in these instances the language shows clearly that more than one surety is required.—§§ 1683, 3676. But as the object of the law is security merely, and as this may be attained by the taking of one surety, we will not require

more than that number, unless the words are so clear and unequivocal as to force that construction upon us, which they are not in the present case.

Another ground on which the motion is pressed, is, that the record shows that a writ of error has been taken upon the judgment. It does not appear that any transcript of the record was filed at the term to which the writ of error was returnable; and as the case has not been affirmed, the party would have had the right, under the old law, to prosecute a new writ (United States v. Haden, 5 Porter 533; see, also, Perryman v. Camp, at the last term); and as the appeal under the Code is but a substitute for the writ of error, he might properly take an appeal under the same circumstances.

The motion is denied.

TARLETON & POLLARD *vs.* JOHNSON.

1. In trover for the conversion of several bales of cotton, the record of a former recovery in an action of detinue, brought by one who is shown to have been defendant's bailee,—which action defendant by his counsel defended, and in which, on an agreed statement of facts, his title was set up, and held subordinate to plaintiff's,—is admissible evidence for the plaintiff, and parol evidence is admissible, in aid of the record, to show defendant's connection with the case.
2. When a witness testifies, on his *voir dire*, that he was a partner of the firm which is shown by other evidence to have been defendant's vendor of the goods in suit, he may testify to the further fact that said firm was also plaintiff's vendor, thus balancing his interest, and restoring his competency.
3. A person who is shown by parol to have been the real defendant in an action of detinue, though no party to the record, is concluded by the judgment as to the title then adjudicated, but not as to a title subsequently acquired from one who was neither a party nor privy to the action; but the jury must pass upon the sufficiency of the parol evidence, and it is error in the court to assume its sufficiency.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

TROVER by William Johnson, as surviving partner of the

late firm of McCoy & Johnson, against the appellants, for the conversion of thirty-eight bales of cotton. The pleas were, the general issue, and the statute of limitations of six years. On the trial, the plaintiff offered in evidence the record of a suit in detinue, brought by said McCoy & Johnson against Holmes, Bott & Earle. The defendants having objected to the introduction of this record, because they were neither parties nor privies to it, the plaintiff offered to prove that said Holmes, Bott & Earle were mere bailees of the defendants, and claimed no interest whatever in the cotton except as such bailees; that the defendants in this suit employed counsel and assisted in the defence of that suit, and after the determination of it paid the assessed value of a portion of the cotton in suit; and that the cotton now sued for was surrendered to the defendants by said Holmes, Bott & Earle after the levy in that suit. To the introduction of this evidence, for the purpose of making said record admissible evidence, defendants objected; but their objection was overruled, the evidence was admitted, and the defendants excepted. After the introduction of this evidence, the plaintiff again offered said record in evidence, and it was admitted; the defendants objecting and excepting thereto.

"The defendants introduced one George Haig as a witness, and were about to examine him, when the plaintiff's counsel interposed, and examined him on his *voir dire*. Plaintiff's counsel only asked said witness, if he was a member of the firm of Bower & Co.," which firm, as had been previously shown by the testimony of one Davis, was the vendor of the defendants; "to which witness replied, that he was a member of said firm of Bower & Co. at the date of the transaction aforesaid; and thereupon plaintiff objected to the examination of said Haig as a witness, (relying on the testimony of Davis before stated,) upon the ground that said Haig was interested in the suit, being liable over, as plaintiff insisted, to the defendants, as warrantors of the title to the cotton; which objection was sustained by the court, and the defendants excepted. Defendants then offered to prove by said Haig to the court, that said Bower & Co. were also the vendors of the cotton to the said McCoy & Johnson, and that his interest was thereby equally balanced; but the court, on motion of the

plaintiff's counsel, refused to permit the proof of these facts by the witness, and thereupon defendants excepted."

The court charged the jury, "that possession is evidence of title; that if the cotton was on storage in the warehouse of Holmes, Bott & Earle on the 31st day of January, 1846, the date of their receipt to McCoy & Johnson, the receipt of February 13th, 1846, to Tarleton & Scott, did not show a divestiture of their title, unless evidence was given of Bower & Co.'s right to control it at that time; that if Holmes, Bott & Earle, when sued, suffered Tarleton & Pollard to defend the suit, and if they defended the suit for all the cotton, relying on their own title, and that the cotton, during the suit, was surrendered to them, and disposed of by them, and that the cotton now sued for is part of the same cotton, then the judgment in that case is evidence of title against the defendants." The defendants excepted to these charges, and asked the court to charge as follows: "1st, that if the jury believe all the evidence in this case, they cannot regard the verdict and judgment against Bott & Earle as conclusive evidence of title in the plaintiff, so far as respects Pollard: 2d, that if they believed the cotton belonged to Pollard on the 14th day of February, 1846, they must find for the defendants." The court refused to give these charges, and the defendants excepted to each refusal.

The charges given, the refusals to charge as requested, the admission of the evidence objected to by defendants, and the exclusion of the evidence offered by them, to all of which they excepted as above shown, are now assigned for error.

Bobt. B. Armistead, with whom was Henry C. Semple, for the appellants:

The record was not admissible, because the parties were not the same, and because Pollard's title was an immaterial issue in the first suit.

In the Duchess of Kingston's case, 20 Howell's State Trials, p. 578, Lord Chief Justice DeGrey says: "A judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter directly in question in another court. But neither the judgment of a concurrent or exclusive

jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred incidentally by argument from the judgment." The subject-matter directly in point in both cases must be the same, and the parties must be the same; the rule being extended to their privies. The defendant in this case was not a party to the record offered, nor was he a privy. To be estopped by this record as a privy, Pollard must claim under Bott; whereas he claims above and before him, and is privy neither in blood, in law, nor in estate.—Coke's Litt. 352 a; 3 Coke 457. A verdict against one under whom either plaintiff or defendant claims, may be given in evidence against the party so claiming; *contra*, if neither claims under it.—Viner's Abr., Evidence (A, b. 76), pl. 1; 1 Ad. & El. 783; Outram v. Moorewood, 3 East 346. One who takes an estate, takes it supported or qualified by any estoppel which affected him under whom he claims.—Wood v. Davis, 7 Cranch 271; 1 Wheat. 6; 14 Johns. 79; 9 Ala. 741; 12 *ib.* 482. The case of Alexander v. Taylor, 4 Denio 302, is much in point: if the cotton had gone into the possession of McCoy & Johnson, and Pollard had brought suit, the two cases would have been parallel in their particulars. Johnson ought not to be allowed to sue Bott, thus depriving Pollard of his testimony, and thus build up an estoppel and circumvent the law.

In many of the cases above cited, the record relied on was pleaded as an estoppel. No case of any authority has ever given more weight to a record when offered in evidence, than when pleaded as a bar; and only in modern cases, and in some courts, has it been allowed equal weight. The old doctrine may be found in Trevivan v. Lawrance, Salk. 276; Vooght v. Winch, 2 B. & Ald. 662. Therefore, in the cases cited, where the former record, when pleaded, was no estoppel, it could not be conclusive if given in evidence.

But, although Pollard was not a nominal party to the former record, nor privy to any party thereto, it is contended that he was the substantial party to the record. We answer, that the plaintiff cannot show who were the parties to that record, except by the record itself.—Jones v. Kolisenski, 11 Ala. 607; 18 *ib.* 24; Allen v. Hall, 1 A. K. Marsh. 525. The

New York cases, in which intimations to the contrary are given, are clearly distinguishable from the case at bar, as will appear from an examination of them and of the authorities relied on.

As to the issue: In the first suit, the point properly in issue was, the wrongful detainer of Holmes, Bott & Earle; Pollard's title was immaterial and irrelevant, and therefore the former record is for this purpose inadmissible. Bott could not defend under Pollard's adverse title, Holmes, Bott & Earle being the bailees of McCoy & Johnson, and having given their receipt as warehouse-men.—Smith's Mercantile Law, p. 102; 9 Bing. 378; 7 *ib.* 345; 2 Camph. 344; 2 B. & Ald. 310; 9 Ala. 317; 12 *ib.* 520; 20 *ib.* 578. If it be said, that Pollard's title was in fact passed upon, the answer is, that the true rule is, not whether the court passed upon that title, but whether that title was material in law.—Mondel v. Steel, 8 Mees. & W. 858, and cases in note. If the rule were otherwise, Pollard might be injured as it is; but if his title had been good, the case would have been lost, because it was immaterial.—1 Green. Ev. § 524. Pollard's title is not *res adjudicata*, and therefore the record is inadmissible.—2 Yerg. 467; 8 Pick. 113; 6 Ala. 270.

Therefore the record was not admissible, and the court erred in admitting it; and, if admissible even, it certainly was not conclusive, as charged by the court; and, if conclusive at all, it was only as to title on the 17th April, 1846, and Pollard may have afterwards acquired title.

Haig, having rendered himself incompetent on his *voir dire*, could restore his competency, by showing that Bower & Co. were liable to Johnson, and thus balancing his interest.—1 Phil. Ev. 155; 1 Greenl. 461; Herndon v. Givens, 19 Ala. 313; 16 *ib.* 261; Dent v. Portwood, 17 *ib.* 242.

DANIEL CHANDLER, *contra:*

The appellants are concluded by the record, 1st, because they are privies to the judgment. The doctrine is found very fully discussed in the cases of Trevivan v. Lawrance *et al.*, and Doe v. Oliver, 2 Smith's Lead. Cas. 435, 486; 3 Cow. & Hill's Notes, pp. 813, 814, 815, notes 562-63-64-66-67; 1 Stark. Ev. 191; 2 Stew. & Por. 134; 9 Por. 412. 2d, Tarleton & Pollard

took possession of the cotton after the suit was brought against Holmes, Bott & Earle, and while it was in the custody of the law. The record is as conclusive against them, under such circumstances, as it would be against the original defendants. 13 Johns. 447; 8 Cowen 290; 3 Barb. Ch. R. 341; 3 Ala. 158; 4 *ib.* 592; Cow. & H. Notes, n. 567; 3 Porter 138-143; 20 Ala. 280.

Parol evidence was admissible to connect Tarleton & Pollard with the cause.—Cow. & Hill's Notes 838; 8 Wend. 9; 3 Cow. 120; 3 Comstock 511; 6 Ala. R. 27, 780; 7 *ib.* 161; 4 Cow. 562; 16 Serg. & Rawle 282, 285. These authorities establish the fact, that where the record itself does not show that the matter in issue was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. The evidence was offered as a whole to connect Tarleton & Pollard with the record. The evidence was offered in the first instance to the court, and the judgment of the court as to its sufficiency is not revisable. It is clearly sufficient. The agreed state of facts was a part of the record, and already in evidence. It was proper evidence to show the subject-matter of the former suit, and *what* was the ground on which the judgment was rendered. It was admitted only for that purpose, and to prove the fact in issue in the former suit it was admissible.—6 Ala. 35. It was not evidence for all purposes; it was not evidence even to prove all the facts it recited. The former cause and this cause related to the same subject-matter. Certain property was involved in both suits, and certain facts were in issue in the former suit. There was a connection between the suits, and on the trial of the former suit these admissions were evidence to settle the right to certain property. To prove that the same property was involved in this suit that had been recovered in the former one, was the object of this evidence, and for this purpose it was admissible. We wish to prove, by this agreed statement, no new fact—not what the admissions were—but simply whether or not the matter now in dispute was in issue in the former suit. The record does not show it. Parol evidence, not inconsistent with the record, may be resorted to. On the former trial, the agreed statement of facts was admissible, and was introduced; on this trial we can use

it, not as admissions of facts, but simply to show that in the former suit certain cottons were sued for and recovered. In this case we do not rely on the *facts* stated in that agreement; we don't care what they were; what we wish to show is, that the subject-matter of this suit was involved in that suit, and showing that, the law says, as we have endeavored to show, that the defendants are concluded by it. In short, we use the admission to identify the causes of action, not to prove facts. The identity, not the existence of facts, is proved by us. We say this matter has been settled by a judgment of the court, and as the record does not show it, this evidence does.

As to the rejection of Mr. Haig—

1. There is an implied warranty in the sale of personal property, and a party to a sale is not a competent witness to sustain his title. He is liable for the recovery and costs.—6 Johns. 7; 2 Harr. & Gill, 176; 6 Greenl. 416; 17 Maine 378; 2 Kent 574.

2. The fact of Haig's interest appeared to the court from the evidence of Davis. Davis swore that he had purchased the cottons from Bower & Co., and paid them the price, and took their receipt. It was not competent for Haig—one of the partners—to remove this charge of being interested, when the fact had not appeared by his own evidence. The only fact asked of Haig was as to his identity—whether or not he was a member of the firm of Bower & Co. when the sale took place. If so, he was an incompetent witness, and the objection to his introduction was properly sustained. The defendants endeavor to remove the objection by showing that Haig was an indifferent witness, and this fact they attempted to prove by Haig himself. His testimony was not admissible to remove the objection to his competency. If other competent witnesses had showed that fact, then the objection that he was interested would have been removed.—13 Conn. 319; 1 Cow. 513, 535; 1 Martin (N. S.) 709; 17 Ala. 247; 22 Eng. Com. Law, note, Tindal's opinion. Again; Haig was not a competent witness, on the ground of public policy. The object of his testimony was to defeat the title of the plaintiff—a title that he had made. The same cottons that were sold to McCoy & Johnson on the 31st of January, by Bower & Co.,

were afterwards sold by them to Tarleton & Scott. Haig is now introduced by the defendants, to invalidate our sale, and to establish that of the defendants. In selling the cotton to the defendants, Bower & Co. impliedly warranted the title, and Haig, one of the firm, is introduced now to support that title. If he was not interested, (as he clearly is,) he ought to be rejected on grounds of public policy.—20 Ala. 584.

As to the charges of the court—

1. The first charge is, that McCoy & Johnson having stored the cotton with Holmes, Bott & Earle in January, 1846, a voluntary and unauthorized acknowledgment by them of the title of Tarleton & Scott, the 13th of February after, did not divest that title. It appears from the record, that Tarleton & Scott obtained a receipt two weeks after that of the plaintiff, and there is no proof of their manner of obtaining it. The court says, in this case, that did not defeat the title. In so saying, the court only decided what was settled in the former trial of the cause.—20 Ala. 578.

2. The court further charged, that if Holmes, Bott & Earle, when sued for the cotton, suffered Pollard & Tarleton to defend the suit, and if it was defended by them and on their title, and if they received the cotton and disposed of it, and this cotton is the same, this judgment is evidence of title. The reasons for this charge have already been fully considered. If the defendants were privies to the record, and received the cotton after suit and levy, as is abundantly proved, then the judgment in the former case is evidence of our title in this case.

3. The defendant asked the court to charge the jury, that if they believed all the evidence in this case, they could not regard the judgment as conclusive against Pollard. Such an instruction the party had no right to ask. The judgment was evidence of title; that the court had decided. The weight of the evidence the court had not declared. Some authorities say it would be conclusive; others, but *prima facie*, that is, conclusive if not repelled. The court was entitled to the information as to the facts of the case, which determined the weight of the evidence. The court was not required to hunt through the evidence for the facts that tended to diminish the weight of this evidence. The counsel was bound to

state the particular circumstances or facts that contributed to effect this result, and to ask the court for an instruction founded upon them only. The court, however, was authorized to find that the judgment was conclusive upon all the evidence. If, however, the court was not authorized to do this, it was not bound to say it was not conclusive. The charge, in the terms in which it was asked, tended to mislead and confuse the jury. It did not ask the court to charge the precise effect of this judgment by itself, or in connection with specific facts, but was negative and unascertained. The court was required to say it was conclusive evidence, if the jury believed all the evidence.

4. The last instruction asked was, that if the jury believed the cotton belonged to Pollard on the 14th February, 1846, they must find for the defendants. The court had previously charged the jury, that if the cotton was stored by the plaintiff with Holmes, Bott & Earle on the 31st January, 1846, and they gave the plaintiffs their receipt on that day, that their subsequent receipt to Tarleton & Scott, on the 13th of February, 1846, did not divest the plaintiffs of their title. In other words, the transfer of the cotton so stored by Bower & Co. to the plaintiff, on the 31st January, 1846, gave the plaintiff a title to the cotton; and the subsequent transfer to Tarleton & Scott of the same cotton, on the 13th of February, did not divest the plaintiff of this title. The receipts were before the court; the evidence on this point was conceded; there was no conflict or dispute about it. The court was justified, therefore, in refusing to charge that the cotton belonged to Pollard on the 14th of February. Again; the plaintiff traced his title to the judgment, that related to the suit in April, when the cotton was seized by the sheriff. The possession of Pollard was after the levy, and subject to that suit. We could have compelled a restoration of the cotton by a writ of *distringas*, if the cotton had been in the defendants' possession, for they came in possession *pendente lite*, and subject to the same liabilities that had been incurred by the original defendants. The plaintiff's case makes out a state of facts showing that the matter now in controversy was concluded by a previous judgment; this estopped the defendants as to every other matter. Until he adduced proof tending to

do away with this state of the case, the court should have acted on it, and excluded all other proof. It was in this view of the case immaterial what was the ruling of the court as to the other proof offered; for all such should have been excluded; and whether it was wrongfully excluded or not, the result was right and should be upheld. The defendants should have shown that they made proof, which, at least, would have left the matter of previous conclusion open as a fact, before they could claim to put in any evidence to the merits.

5. The merits of the case are clearly with the plaintiff; and if any error has been committed, (which we do not admit,) its ultimate decision must be against the defendants; provided the cotton now sued for was embraced in the former suit, and afterwards received by the defendants; and provided further, they are privies to that suit. On these two points the evidence and the law are clear and conclusive. If so, the court will look at the rights of the parties, save unnecessary litigation, and do justice now, rather than postpone its administration to another time.

CHILTON, C. J.—William Johnson, as survivor of the late firm of McCoy & Johnson, brought an action of trover against the appellants to recover thirty-eight bales of cotton, alleged to have been converted by them.

It appears that these thirty-eight bales were a portion of a lot of cotton which had previously been recovered by McCoy & Johnson in an action of detinue against the firm of Holmes, Bott & Earle, (see the case reported in 20 Ala. 578,) and that the sheriff, in taking replevy bonds from Holmes, Bott & Earle in that suit, had omitted to insert these thirty-eight bales, but had returned the whole of the cotton to H. B. & E. upon their giving bonds only for sixty-five bales. After the cotton was thus replevied, and pending the suit, that now in controversy, with other portions or the whole of it, was delivered by H. B. & E. to Tarleton & Pollard, the appellants, who employed an attorney, and defended the first suit for the defendants, who occupied the position of warehousemen or bailees to them. It further appeared that the replevy bond was given by the procurement of the present appellants, and that after the final judgment was rendered, and one of

the obligors in said bond had paid the alternate value of forty bales of the cotton, Tarleton & Pollard had repaid this money. All this, however, was made to appear by proof *de hors* the record, and which was excepted to in the court below, the record itself furnishing no evidence that Tarleton & Pollard were parties or privies to that controversy.

The first and main question for consideration is, whether it was permissible to introduce parol proof, to show the connection of Tarleton & Pollard with that suit, and if so, whether the verdict and judgment then rendered are to be conclusive upon them in this action.

There are a number of cases, which seem to discountenance the doctrine of aiding a record by extrinsic parol proof (see them referred to in 3 Phil. Ev., Cowen & Hill's Notes, pp. 838, 839, n. 590); but the great preponderance of American authority is in favor of its admission.—See Parker v. Thompson, 3 Pick. 429; Kilheffer v. Herr, 17 Serg. & Rawle 319; 3 Phil. Ev., *supra*, and cases cited in note 590. Whether any matter has been tried before between the same parties, and judicially decided, must, in most cases, necessarily depend upon parol evidence in part. The identity of the parties, and of the subject-matter, can only be shown in this way.—Cist v. Zeigler, 16 Serg. & Rawle 282; Crotzer v. Russell, 9 *ib.* 81. So, the record of a judgment against *James* R. is admissible in an action against *Joseph* R., if it is made to appear that the latter was the same person, and in fact a party to the suit, and defended it.—Stevelie v. Read, 2 Washington's Cir. Court Rep. 274.

We are aware that it has been held by the Court of Appeals of Kentucky, that no persons can be considered parties to a suit, so as to be bound by the judgment, unless they appear *by the record* to be such, and that extrinsic evidence is not admissible to prove that persons not named in the record were parties (Allen v. Hall, 1 Mar. 526); but this strictness does not accord with the current of American decisions, nor indeed with the text-writers on the subject.—See cases collated in 3 Phil. Ev. (C. & H. notes) 974–5.

Mr. Peake, in his work on Evidence, p. 74, says: "But where it is said a verdict is not evidence for or against one who is not a party to a cause, it is not to be understood that

a man who merely uses the name of another for his own benefit, is not bound by the verdict which is given against him. Courts of justice will take notice, in these cases, who is the real plaintiff or defendant in a cause," &c.

Mr. Starkie (vol. 1, p. 219, marg.) says : " It is not essential that either the parties, or the form of action, should be the same, if they are *substantially* the same."

Mr. Phillips (vol 1, p. 324) says: " In considering the effect of verdicts and judgments, courts of justice will always take notice of the real parties to the suit." See, also, Gilbert's Law of Ev. p. 35.

Mr. Greenleaf (vol. 1, p. 672, § 523) says: " All persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings."

An application of the doctrine asserted by the text-writers will be found in the case of Kennersley v. Orpe, 2 Doug. 517, where an action of trespass was brought by the owner of a fishery against William Orpe; and the defendant justified as the servant of Doctor Cotton. The evidence showed that a previous action had been tried between Kennersley and *Thomas* Orpe, another servant of Cotton, involving the same right, and had been decided for the plaintiff, and that both the Orpes had acted by the command of Cotton, who ordered the defendant to fish in the same place, that he might try the right over again, of which he gave notice to the plaintiff.— The question came up, whether the verdict and judgment in the first case should be received as evidence in this, the parties appearing on the record to be different. Upon the trial at the assizes, Baron Perkyn overruled the objection to the admission of the record, and held the judgment to be conclusive. Upon motion for a rule to show cause why a new trial should not be granted, the court of King's Bench held the record of the former judgment admissible, but that it was not conclusive.

The authority of this case was questioned by Lord Ellenborough in Outram v. Morewood, 3 East 366, but it is cited without disapprobation by the elementary writers, and, when rested on the ground that both actions were substantially between the same parties, it is clearly defensible. See opinion

of Spencer, C. J., in Case v. Reeves, 14 John. 82; also, Shelton v. Barbour, 1 Wash. 64; Calhoun's Lessee v. Dunning, 4 Dallas 120.

In the case last cited, an action had been tried between Dunning and Caruthers, involving the right to the *locus in quo* claimed by Calhoun in this suit. It appeared that Caruthers, the then defendant, was the person now really interested in the land, and that Calhoun was a mere trustee for him, and that an action might be brought in the name of the *cestui que trust*. It was objected that the former judgment in favor of Dunning was not between the parties to this suit, and should not, therefore, be allowed to affect their rights; but the court said: "We can never acquiesce in an attempt so manifestly calculated to evade the truth and justice of the case. Shall it be in the power of a party, by suppressing a deed, or by employing the name of a trustee, to avoid the legal effect of a judgment rendered against him?" They add: "It is plain the name of Calhoun is now employed for the use of Caruthers; and that the parties are really, though not nominally, the same in both suits."—1 Mon. 253; 4 Gill & John. 407; 10 Pick. 166; 4 Rawle 273; 4 Wash. Circuit Court Rep. 503.

Applying these principles to the case before us, we find but little difficulty in the solution of the question as to the admissibility of the record of the former judgment. Holmes, Bott & Earle, it is true, were defendants, as shown by the record, but they were the bailees of the appellants. The latter carried on the suit in their names, and employed counsel, and made a full defence. Whether, in strictness of law, their title could have been properly adjudicated in an action against their bailees, is not material now, since it is shown by the record that it was set up, and was decided upon, on the submission of an agreed state of facts, and held subordinate to the title of McCoy & Johnson. They had the sole management of the case by their counsel. It was tried upon their agreed state of facts, in which their title was set up by their counsel, and the case was brought to this court, where it was affirmed. Finally, after the judgment was rendered against their bailees, they proceed to make satisfaction of it, so far as to relieve the persons whom they procured to become sureties

on the replevy bond. Under this state of facts, to hold that they were strangers to that proceeding, would be to shut our eyes to the truth of the case, and to look alone to the nominal, rather than the real, substantial parties to the litigation. Indeed, under the agreed state of facts, the conflicting claims of these respective bailors to the cotton, were as fully adjudicated and decided upon, as they would or could have been under the old common-law practice in actions of detinue, where the bailee, a mere stakeholder, by process of garnishment compelled the two claimants of the subject-matter of the bailment to interplead. This the claimants have substantially done in the first case that was tried; and after an express adjudication adverse to their claim, it is not for them to say that nothing has been decided which should bind them. See, as to the common-law practice of interpleader in detinue, Viner's Abr., titles, Detinue and Interpleader.

Our conclusion is, that there was no error in admitting the parol proof showing who were the real parties in interest in the former suit, and that the judgment was properly received as evidence against the appellants.—Clark v. Dignam, 3 Excheq. Rep. 478.

As respects the testimony of Haig to prove himself competent: we think the court erred in its rejection. True, if his interest had been made to appear independent of his own evidence, he should not by his testimony be allowed to render himself competent. But the counsel for the appellee examined him upon his *voir dire*, and proved that he was a member of the late firm of Bower & Co., who sold the cotton to the appellants. This was a fact—his being a member of that firm—which went directly to show his interest, and without which it was not made out. Having charged himself, he could in the same way discharge or balance his interest. In Butcher's Co. v. Jones, 1 Esp. 160, the witness, in answer to a similar question, stated that he was a member of a chartered company, which made him interested, and this would seem, as in the case before us, to be an inquiry merely as to his identity; yet he was allowed to proceed and prove that he had been disfranchised, and thereby render himself competent.

So, in a suit by an administrator, a witness introduced on

his behalf was asked if he were not one of the heirs-at-law, and answering in the affirmative, was held competent to discharge himself by proving a release of all his interest in the estate.—Ingram v. Ward, cited in 1 Greenleaf's Ev. p. 572, § 422, n. 6.

The charge that the judgment was conclusive, was likewise erroneous. It depended upon the parol proof for its connection with the appellants, which the jury might or might not think sufficient to establish such connection. If the plaintiff had replied the judgment by way of estoppel, he must needs have averred the facts connecting the appellants with it, or it would have amounted to nothing; for, *prima facie*, it is *res inter alios*. These facts, then, should have been submitted to the jury in connection with the record; so that, when the court held the record conclusive, it must needs have been assumed that the proof showing the appellants' connection with it was conclusive. We are of opinion, that if the appellants are connected so as to make them (or rather Pollard, the party beneficially interested) the real defendants, then the judgment becomes conclusive *as to the title adjudicated in that suit*, but not as to a title subsequently acquired from persons not parties or privies to that judgment. The case of Kennersley v. Orpe, *supra*—the strongest case which we have seen for the appellee—held that the judgment was not conclusive.

As the case must go back for another trial, it is not necessary to discuss the other questions argued at the bar. What we have said will be sufficient to govern its future conduct.

Let the judgment be reversed, and the cause remanded.

Note by Reporter.—Mr. Semple, of counsel for the appellants, afterwards filed a written petition asking a modification of that part of the foregoing opinion which asserts, that if the appellants were connected with the former suit, "so as to make them the real defendants, then *the judgment becomes conclusive as to the title adjudicated in that suit*, but not as to a title subsequently acquired from persons not parties or privies to that judgment." He contended that the judgment would be conclusive on the appellants only as to all defences which could have been made by them in that

suit; that Pollard, at the commencement of that suit, had a title which could not, under the rules of law, have been made available in that case, because Bott & Earle were estopped from setting up an outstanding title in a third person by the relation which they occupied towards McCoy & Johnson—that of warehouse-men; and yet his title could be made available as a complete defence in an action by McCoy against him directly. To show that Pollard's title could not not have been set up as a defence in that case, however good it might be in an action against him directly, he cited Story on Bailments, §§ 266, 450, 582; Cowp. R. 244, 344; 6 Ad. & El. 515; 2 B. & C. 540; 7 Bing. 339; 10 *ib.* 246; 9 Price 269; 44 Law Lib. 353–4. And to show that, although a defence was attempted by way of recoupment, and sustained, yet the party might bring an action for the same matter, if there was any part of his cause of action which could not have been used as a defence in the former suit, he cited 8 Mees. & W. 858; 2 Johns. 30; 7 *ib.* 22; 6 Cowen 262.

To this application the court responded as follows:

CHILTON, C. J.—We have examined this petition, and re-examined the opinion; and we are satisfied the modification asked for should not be made.

LEWIS, USE &C., *vs.* LEWIS.

1. An entry on the judge's docket, in the hand-writing of the presiding judge, reciting that the plaintiff was ruled to give security for costs by the next term, is not sufficient to authorize the entry of an order to that effect *nunc pro tunc* at a subsequent term, unless it shows the reason why the order was made.
2. Security for costs cannot be required upon proof of the non-residence of the nominal plaintiff who sues for the use of another person.

ERROR to the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THE bill of exceptions states that, at the Fall term, 1852, this case was regularly called for trial, and the plaintiff announced himself ready, when the defendant objected to proceeding with the trial, and moved to dismiss the suit, because the plaintiff had not given security for cost in pursuance of an order to that effect, founded on his non-residence and notice to his counsel that such security would be required. The plaintiff's counsel denied this; whereupon the defendant produced the docket kept by the presiding judge at a former term, and read therefrom the following entry, which was in the hand-writing of said judge, and opposite this case: "Plaintiff ruled to give security for costs by the next term; continued by defendant on payment of the costs of the term." The defendant then proved, that the nominal plaintiff, Lewis, was a non-resident of the State at the commencement of the suit; and he also showed, by parol, that, at the term at which the order was made, his counsel gave verbal notice to the counsel of the plaintiff to give security on the ground that the plaintiffs were non-residents, but that the non-residence of the plaintiffs was contested. The court then offered the plaintiff the privilege of then giving security for costs, which he declined to do. The defendant then moved the court that the order requiring security for costs to be given be entered *nunc pro tunc* as of the term when the entry on the judge's docket was made, which was granted, and it was so entered on the minutes of the court; the plaintiff objecting, and excepting to the ruling of the court. The court then ordered the suit to be dismissed for want of security for costs; to which the plaintiff excepted.

These several rulings are here assigned for error.

J. B. MARTIN, for plaintiff in error.

JOHN T. MORGAN, *contra.*

LIGON, J.—Under the decision of this court in the case of Reid v. Brasher, 7 Porter 448, the court erred in entering the order requiring the plaintiff in the court below to give security for costs, *nunc pro tunc.* The entry on the judge's docket of the previous term, failing to show *the reason* why the order was made, would not justify its being entered *nunc*

pro tunc at a subsequent term. The case cited from 7 Por. overrules the case of Miller v. Thompson, in 2 Stew. 470, in which a different decision was made. The practice, in respect to such orders, may be considered as settled by the case of Reid v. Brasher.

The proof of non-residence, offered at the trial, would not justify the order of the court, made at that term, for two reasons: First, the requirement to give security in a less time than sixty days is opposed to both the letter and the spirit of the statute on this subject.—Clay's Dig. 316, § 26. Here it was peremptory, and security was required to be given *instanter*. Second, the proof which was offered as to the non-residence, at the term at which the entry of dismissal was made, extended only to the nominal plaintiff. If either the beneficial, or the nominal plaintiff resides in this State, no security for costs can be required under our statute, since they are regarded as joint plaintiffs, in respect to the costs of suit, and both are liable for them.—Clay's Dig. 316, § 22.

Let the judgment be reversed, and the cause remanded.

WITTICK *vs.* TRAUN.

1. In detinue for a slave, a plea of a former judgment in favor of the defendant is nothing more, in effect, than that the title to the slave was in the defendant at a day certain before the commencement of the suit; it is, therefore, defective on demurrer.
2. A judgment, when rendered on a verdict on the merits, is final and conclusive between the parties, not only as to the facts actually litigated and decided, but upon all the facts necessarily involved in the issue.
3. In detinue for several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment entry is entirely silent, is a judgment in favor of the defendant for that one.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

DETINUE (under the Code) for sundry slaves. Several errors are assigned, which it is unnecessary to notice, as the

main point argued by the counsel, (and the only one decided by the court,) was the action of the court below upon the eighth plea and the replications to it, and this plea is substantially set out in the opinion.

GEORGE W. GAYLE, for the appellant.

J. W. LAPSLEY, *contra.*

GOLDTHWAITE, J.—In the present case, the controversy, by the agreement of counsel, is confined to the slave Ann, it being admitted that all the other slaves sued for have been received by Traun under a former recovery; and the sole question as to Ann arises upon the action of the court below upon the eighth plea and the replications to it. This plea sets forth the entire record in a former action, brought by the appellant against the appellee, for certain slaves, one of which is described in the writ and declaration as "a slave named Ann." The judgment entry recites the appearance of the parties,—that a jury came, &c., "who upon their oaths do say they find for the plaintiffs, and assess the value of the slaves sued for as follows, to wit,"—setting forth all of the slaves sued for, and their separate values, except Ann, as to whom nothing is said, and assessing a sum certain as damages for the detention of the slaves; and then follows the judgment of the court, "that the plaintiff recover of the defendant the said slaves, to-wit":—setting out the names of all of them except Ann, "or their separate values as assessed, and also damages," &c. The plea then avers, that said judgment has not been reversed or set aside, and that the same has been fully satisfied by the defendant; and also avers that the slave Ann, named in the complaint of the plaintiff, is the identical slave of that name which the former action was brought to recover, and that in relation to her, the judgment and proceedings, as set out in the plea, are a valid and binding adjudication.

It is clear this plea was defective; for, if it be conceded that the former suit was an adjudication upon the title of the slave in question in favor of the plaintiff, still its only effect would be, to settle the rights as between the parties up to the rendition of the judgment in that suit. It could not settle

any question subsequent to that period, and could not, therefore, prevent the plaintiff from recovering, upon a title acquired after the judgment; so that, in fact, the plea amounted to nothing more, in effect, than that the title to the slave was in the defendant at a day certain before the commencement of the suit; and, as this would be no answer to the declaration, the demurrer to this plea should have been sustained.

But as the plea could be amended, or the record of the former proceedings given in evidence without being pleaded, it is proper to ascertain the effect of these proceedings upon the slave in controversy, with a view to the direction of the case upon another trial.

The rule is established, that judgments are final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but that they are equally conclusive upon all the facts that were necessarily involved in the issue.—Cummings v. McGehee, 9 Port. 349; Greenl. Ev. §§ 522, 528; 3 Cowen & Hill's Notes to Phil. Ev. 830. The record of the former suit shows, that it was brought to recover the slave in controversy, and the character of the action was such as to put the title of the plaintiff to her directly in issue; and the real question is, whether, under such circumstances, we are to construe the judgment entry as a judgment in favor of the plaintiff, or the defendant, as to the slave Ann. The court moulds its own judgments; and looking to the general course of practice which has prevailed in this State, we must regard the judgment as being in favor of the defendant for the slave referred to. In trials of the right of property, where a portion only of the property has been found subject, the usual course has been to enter up judgment for that portion only; and at a very early day we held, that in such a case, a verdict that part of the property levied on was liable to the execution, was equivalent to finding the residue not liable.—Lewis v. Lewis, Minor's Rep. 99. So, in an action of debt counting on several distinct debts, we apprehend that a judgment for one of the debts declared on would operate as a judgment in favor of the defendant for the other debts; and, if we are correct in this, we can see no reason why the same rule should not apply to the action of detinue, which is nothing

but debt in the detinet. Again; the judgment in the present case is not in favor of the plaintiff for the slave Ann; it is altogether silent as to her, and no execution could issue upon it so far as she is concerned; and as the judgment, in this respect, is not for the plaintiff, we must, in the present inquiry, hold it as being in favor of the defendant as to this slave, for the reason we have before assigned, that it is a judgment upon an issue which necessarily involved the right of the plaintiff to the slave, and is not a judgment in his favor upon that right. Whether the action of the court in rendering the judgment was correct, or whether the verdict in the case was broad enough to cover the issues presented, and to authorize the court to render any judgment, are questions which do not arise upon the present record. Our decision only determines the effect of the proceedings as they are set out in the plea, with reference to the case in the position it now occupies.

For the error of the court below in overruling the demurrer to the eighth plea, the judgment is reversed, and the cause remanded.

PRATER *vs.* MILLER.

1. An heir-at-law having employed counsel to contest the probate of her father's will, the devisees promised, in consideration that she would withdraw all opposition and allow the will to be admitted to probate, to pay her a certain sum; but it was not shown that there was any ground for contesting the probate of the will, or any doubt as to its validity: *Held*, that this was not a sufficient consideration to support an action on the promise to pay.
2. The court has a discretion, under the Code, to allow an amendment of the complaint by the addition of another count, even after the jury has been instructed.

APPEAL from the Circuit Court of Benton.

Tried before the Hon. THOMAS A. WALKER.

THIS action was commenced by summons and complaint

under the Code. The contract declared on is as follows: "The plaintiff claims of the defendants $1000, agreed to be paid to her by the defendants, in consideration that she and one Memory Allen and his wife Elizabeth, children and heirs-at-law of John Prater, deceased, would desist from objections which they were about to make to the probate of the last will and testament of said John Prater, the father of said defendants, who were devisees under said last will and testament, and to the validity of the same, and permit the same to be admitted to probate without her objecting thereto, or contesting the validity of the same; and she says that, in consideration of said promise, she did desist, and said Allen and wife did desist, from making any objections to the probate of said will, and that the same was admitted to probate without any objections being made thereto; whereupon the defendants, heirs-at-law and devisees of said John Prater, deceased, promised to pay said plaintiff within $100 of the amount to be received by them respecting a devise of the said John Prater under his said last will and testament; and she says the above sum of $1000 will be the amount within $100 of the sum which defendants respectively received as devisees under said will, and that sum is now due."

"On the trial, the plaintiff, who was one of the heirs and legatees of John Prater, deceased, offered evidence tending to prove that, on the day when the will of said Prater was offered for probate before the probate judge of Benton county, she appeared for the purpose of contesting the same, and had employed counsel for that purpose; that the defendants made the promise set out in plaintiff's complaint, the sole consideration for which was, that plaintiff should withdraw all objection to the probating of said will, and suffer the same to be probated so far as she was concerned. There was no evidence that there was any objection whatever that could have been urged against admitting said will to probate." The court charged the jury, in substance, that if they believed from the evidence that, when said will was offered for probate, plaintiff employed counsel to contest it, and appeared before the court for the purpose of contesting it, and that defendants, in consideration of her withdrawing her opposition to the probate of said will, promised to pay her the sum of money

now sued for, this is a sufficient consideration to sustain an action on the promise; to which charge the defendants excepted.

"After all the evidence had been adduced, the argument of counsel heard, and the court had charged the jury, upon defendants' asking the court that, if there was a variance between the proof and the contract set out in the complaint, plaintiff could not recover, plaintiff asked leave to file an additional count to her complaint; to which defendants objected, but their objection was overruled, and the following count was then filed, to-wit: "Plaintiff claims of defendants $1000, due from defendants to plaintiffs, with interest from the — day of October, 1850"; to which defendants excepted.

The charge of the court, and the allowing of the amendment, are now assigned for error.

JAS. B. MARTIN, for the appellants:

1. The complaint alleged the consideration of the contract declared on to be, that plaintiff *and Allen and wife* should desist from objecting to the probate of Prater's will, and that they did desist; while the charge asserts, that plaintiff may recover without showing that it was a part of the contract that Allen and wife should withdraw their objections, and that they did withdraw them. The charge, therefore, was erroneous.—Rowland & Heifner v. Ladiga's Heirs, 21 Ala. 9. The consideration of the contract must be proved as alleged, to entitle the plaintiff to a recovery.—Chitty's Pl., pp. 304-5; Stone v. Knowlton, 3 Wend. 374; 3 Caines' Rep. 286.

2. The charge broadly asserts that the plaintiff may recover upon the consideration proved, although no injury or inconvenience resulted to her from the promise, and no benefit accrued to the defendants, and although it was not in compromise or settlement of a suit, or other legal contest, as to the result of which there was any doubt in law or fact. The bill of exceptions declares, that the *sole* consideration proven was, that the plaintiff should desist from objecting to the probate of the will; and this was not sufficient. In all the cases in which a promise, made in compromise of a legal claim or demand, has been held good, either a suit was then pending, the cost and trouble of which were avoided by the promisor, or the facts showed the existence of a cause of action, the jus-

tice or legality of which was doubtful; for it is well settled, that forbearance to sue, when no cause of action existed, is not a sufficient consideration.—Parsons on Con., pp. 363-67; Newell v. Fisher, 11 Sm. & Mar. 431; Edwards v. Baugh, 11 Mees. & W. 641; Longridge v. Dorville, 7 Serg. & Low. (5 B. & Ald.) 43; Cro. Eliz. 206; Holt v. Robinson, 21 Ala. 106.

3. The court erred in allowing an additional count to be filed. An amendment of a declaration will not be allowed, in a material point, after an issue is submitted to the jury.—Watkins v. Canterbury, 4 Por. 415. There is nothing in the Code which tends, in the slightest degree, to sanction the action of the court. Section 2402 applies only when there is "a defect, or want of form," in the complaint, which is not pretended here, as the complaint set out a good cause of action, in a legal and formal manner, and its allegations, if proved, would have authorized a judgment on it. The amendment was allowed after the evidence was closed, after argument had, after the jury had been charged, and when the defendants' counsel invoked a principle of law which showed that the plaintiff had failed to make out her cause of action by the proof; its effect was, to allow the plaintiff to declare upon another cause of action, of which the defendants had no notice, and which changed the case that had been already submitted to the jury. To allow such an amendment, would be to abrogate all the substantial and salutary rules of pleading, as well as those which are merely technical, and, instead of requiring the proof to conform to the pleadings, allow a party to make his pleadings conform to the proof when ascertained. Amendments which are allowable are within the discretion of the court, and cannot be reviewed; but the granting of inadmissible amendments is revisable on error.—Guilford v. Adams, 19 Pick. 376; Haynes v. Morgan, 3 Mass. 208; Brigham v. Este, 2 Pick. 32.

4. Is not the contract here relied on illegal, as being against public policy?

WHITE & PARSONS, and M. J. TURNLEY, *contra:*

1. The consideration of the contract declared on is sufficient to sustain the action. A benefit conferred, or an injury suffered, is a sufficient consideration to sustain a promise. Pre-

vention of litigation, or any equivalent proceedings to try a question, the legal result of which is doubtful, is a good consideration; and no investigation into the character of the claims submitted, upon an agreement to prevent or stop litigation, will be permitted.—Parsons on Con., pp. 357, 364, 369; Chitty on Con., pp. 29, 43, and notes; Story on Con., p. 353; Okison v. Barclay, 2 Penn. 531; 3 Pick. 93.

2. The amendment of the declaration was properly allowed. Code, §§ 2402, 2403.

CHILTON, C. J.—The executors of John Prater having propounded his will for probate, Mrs. Miller, the daughter and one of the heirs-at-law of the testator, employed counsel, and appeared in the Probate Court on the day set apart for proving the will, and avowed her intention of contesting it. Thereupon the appellants contracted and agreed with her, that, in consideration of her making no contest, and allowing the will to be proved as the last will and testament of her father, they would pay her the sum sued for. In conformity to the agreement, she made no contest, and now seeks to recover the amount which they agreed to pay.

There is no evidence that any just cause existed why the will should not have been admitted to probate as valid, nor is it shown that even any doubt existed as to its validity. The appellee threatened to contest it, and went so far as to employ counsel for this purpose, and was induced to desist by reason of the appellants' agreement to pay her the sum demanded. The charge of the circuit judge substantially presents the question, whether, under such a state of facts, she was entitled to recover. He was of opinion, and so charged the jury, that, if the facts existed as above stated, she could maintain her action.

The plaintiff in the court below relied upon a verbal contract, and it was incumbent upon her to show that it was supported by a consideration such as the law will regard. Her engagement was, to interpose no objection to the probate of her father's will—a general forbearance to gainsay its validity in the Probate Court. Is this, without more, a sufficient consideration? If no doubt existed as to the validity of the will, it was her legal duty not to have interposed. It could not

be tolerated that any one should enforce a promise to pay money, the sole consideration of which was an exemption from a threatened suit, for which there was not the least foundation. As well might a party be allowed to recover upon a contract to pay so much money in consideration that the plaintiff would not slander the defendant, as that he would not make a false clamor in court against him. To make such consideration valid, there must be some *legal right* abandoned or postponed, or some obligation imposed by the contract beyond what the law, without it, enjoins as a duty. Mrs. Miller could have made a contest, but would it have availed her anything? If she had even proved successful, it is not shown that she would have been benefited. The proof entirely fails to show that she has suffered any detriment or inconvenience, or that the defendants below have in anywise been benefited.

The old cases upon this subject held, that the forbearance of suit, where a party was not liable, was not a good consideration.—Tooley v. Windham, Cro. Eliz. 206; King v. Hobbs, Yelv. 26. A modification of this doctrine was introduced by the court in Longridge v. Dorville, 5 B. & Ald. 117, where it was held, the yielding up the prosecution of a right as to which the law was doubtful would sustain a promise to pay. But it was admitted by Holroyd, J., in that case, "that if a person is about to sue another for a debt for which he is not answerable, the mere consideration of forbearance is not sufficient to render him liable."

In Edwards v. Baugh, 11 Mees. & W. 641, the declaration stated, that disputes and controversies were depending between the plaintiff and defendant, as to whether or not the defendant was indebted to the plaintiff in, to-wit, the sum of 173*l.* 2*s.* 3*d.*, for money lent to and paid for the defendant by the plaintiff; and thereupon, in consideration that the plaintiff would then promise the defendant not to sue him at any time for the recovery of said sum so in dispute between them, and would accept from the defendant the sum of 100*l.* in full satisfaction and discharge of the same, the defendant promised the plaintiff to pay him the sum of 100*l.* in a reasonable time:—*It was held*, that the declaration was bad, as not showing a sufficient consideration for the promise, there being no allegation that any debt was due, but merely that a dispute and

controversy existed respecting it. It was contended in that case, for the plaintiff, that the relinquishment by him of a right, and a corresponding benefit to the defendant of being saved costs, &c., incident to making defence, &c., was a sufficient consideration; and that the parties, by their agreement, had constituted themselves the judges as to whether anything was due or not, and had admitted thereby the legality of a claim for some amount. But the court held otherwise. "Lord Abinger, C. B.—The declaration only alleges that certain disputes and controversies were pending between the parties, whether the defendant was indebted to the plaintiff a certain sum of money. There is nothing in the use of the word "controversy" to render this a good allegation of consideration." He conceded that the declaration would have been good, if it had averred that the defendant was indebted to the plaintiff in divers sums for money lent, &c., and a dispute arising as to the amount due, the defendant promised to pay so much in satisfaction, &c. In that case, he said, the plaintiff would have been bound to have proved at the trial the existence of a debt to some amount: he might not be bound to prove that the whole amount was due, "but simply to show such a claim as to lay a reasonable ground for the defendant's making the promise;" whereas, he said, "in the present case, he would not have to prove anything beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt. A man may threaten to bring an action against any man he meets in the street." Rolfe, B., said he was of the same opinion, and that the counsel for the plaintiff had laid down the doctrine much too broadly—that if a party forbears to do something which he might have done, that forbearance would be a good consideration for a promise; so that, if it had appeared on the face of the declaration that nothing had been due the plaintiff, his forbearance to sue would even then be a good consideration. "I cannot," said he, "subscribe to that. I think the plaintiff is bound to show a consideration, in the shape of something either beneficial to the opposite party, or detrimental to himself." See, also, 2 Binn. Rep. 509; 5 Serg. & R. 519; Parsons on Con. 365-367; Story on Cont., § 436; 21 Ala. 111; Add. on Con. 32-33; Chitty on Con. 43-4.

In this case, the proof wholly fails to show that any ground of contest existed; and without this, or without some proof showing a reasonable ground of dispute, the plaintiff below had no cause of action, has sustained no injury or inconvenience, and cannot therefore recover.

We think the court had a discretion, under the provisions of the Code, to allow the amendment, and hence we would refuse to reverse for that reason.

For the error in the charge, the judgment is reversed, and the cause must be remanded.

GRIGGSBY *vs.* HAIR.

1. Where several notes, taken for the purchase money of land, are assigned at different times, the assignment of each note is, *pro tanto*, an assignment of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes.
2. An assignment of a note without recourse by the vendor, amounts to an abandonment of the lien; but whether or not the parties intended to abandon the lien, is a matter of fact to be gathered from the evidence and the nature of the transaction.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by Samuel M. Griggsby against James Hair, to obtain the legal title to a tract of land which the defendant held, and to enjoin him from further proceedings in an action at law to recover possession of it. The complainant alleges that, in 1837, one John M. Bolling sold the said tract of land to one Frederick P. Evans, and executed to him a title bond conditioned to make a good and valid title to said land upon receiving full payment of the purchase money; that said Evans executed his notes for the purchase money, with one Joseph Arrington as his surety; that said Bolling afterwards, about the year 1838, endorsed one of said notes,

dated March 1, 1837, and due January 1, 1838, for valuable consideration, to one William H. Keeland; that Keeland brought suit on said note against both Evans and Arrington, and obtained judgment thereon against them, on which judgment an execution was issued, which was returned with a partial credit and unsatisfied as to the residue; that Keeland afterwards, on the 7th of May, 1846, filed his bill in chancery to enforce his lien upon the land for the balance of the purchase money remaining due on said judgment, but, through the mistake of the solicitor who drafted the bill, said Evans only was made a defendant thereto, and the name of said Bolling, who owned the legal title, was entirely omitted; that a decree was rendered in said cause, after regular proceedings, foreclosing said Evans' equity of redemption in said lands, and ordering a sale thereof to satisfy the balance due on said judgment; that said land was accordingly sold by the master, pursuant to said decree, on the first Monday in December, 1847, at which sale complainant became the purchaser, and received the master's deed to the land; that complainant, before the rendition of said decree, "had purchased the said claim so endeavored to be enforced in equity," of which he is still the owner, and which is still unpaid except as above set forth. The bill further alleges that Wm. & R. Kelly also exhibited their bill in chancery, as general creditors, against said Evans and Bolling, to subject the former's equitable estate in said land to the payment of a judgment which they had obtained against him, on which an execution had been issued and returned "no property found"; that neither complainant, nor said Keeland, was made a party to said bill; that the complainants therein obtained a decree and an order for the sale of said land, at which sale the defendant became the purchaser, "whereby he became possessed of the legal estate in the same, subject to complainant's said equitable lien for the unpaid purchase money"; that complainant publicly forbid said sale, and gave notice of his said equitable lien on the land, and that Hair purchased with full knowledge thereof; that Hair afterwards instituted an action at law against complainant to recover said land, and having the legal title thereto, succeeded in obtaining judgment. The bill prays for a perpetual injunction of this judgment, and that

defendant may be held a trustee for complainant of the legal title to said lands.

Hair answers, alleging that said note on which the Kellys obtained judgment was one of the notes given by said Evans for the purchase money of said land; that Kelly's said bill, under which respondent became the purchaser, was not a "general creditor's bill," but was filed for the purpose of subjecting the equitable estate of said Evans, as well as the legal estate of said Bolling in said land, to the satisfaction of their judgment at law for the unpaid purchase money; that the solicitor who drafted Kelly's bill made a clerical mistake, in alleging that their note was transferred without recourse on Bolling; that the Messrs. Kelly were entitled to preference over said Keeland,—their note having been first assigned, their judgment first obtained, their bill in chancery first filed, and their decree first obtained; that respondent, having become the purchaser at the sale under Kelly's decree, forbid the sale under Keeland's decree, and gave public notice that the purchaser would get nothing but a law-suit.

The records of the chancery suits of said Keeland and Kellys, which were used as evidence in this case, show that the note under which said Kellys claimed was assigned in September, 1837, while Keeland's was transferred in January, 1838; that Kellys' judgment was obtained in February, 1845, and Keeland's on the 7th of May thereafter; that Kellys' bill was filed in April, 1846, and his decree obtained in January, 1847, while Keeland's bill was filed in May, 1846, and his decree obtained in June, 1847; that the sale at which Hair became the purchaser was made in September, 1847, while the sale at which Griggsby purchased was made in December, 1847.

The chancellor dismissed the bill, and his decree is now assigned for error.

R. H. Smith, for the appellant:

Hair by his purchase did not become invested with any general (outside) equities in the debt, on which the decree was based, possessed by the Kellys, but not enforced by the bill. The bill did not make the case of equitable lien, but made the case of a creditor without lien (under Hall v. Click,

5 Ala. 363); but yet, having a judgment, and return of "no property," which entitled him to subject any equitable estate of his debtor. The decree under which Hair bought was in harmony with this right. Hair, then, bought, not the debt and its incidents, liens, &c., but a right enforced by a particular process. In solving Hair's rights we cannot look to Kelly's liens, but to his bill, and by it no mortgage lien existed. Hair, then, bought Evans' right, such as it was.—That was subservient to Griggsby's lien, and it is no answer that Kelly, or some one else, may by proceedings over-ride Griggsby. The answer is, though it be so, and should be enforced, this cannot be tacked to Hair's title.

JAMES HAIR, *pro se*, contended that a title bond has all the equitable incidents of a mortgage (5 Porter 452); that the transfer of a debt, unless otherwise expressed, is a transfer of the mortgage also (Duval v. McLosky, 2 Ala. 192); that the assignees of several notes given for the purchase money of land are entitled to priority of payment out of the trust fund in the order of their assignments, and not according to the maturity of the notes (Nelson v. Hatch, 15 Ala. 501); that the allegation in Kelly's bill, that Bolling had transferred the note without recourse, was a mistake of the solicitor who drew the bill, which was clearly shown by the evidence in this case; that the sale under Kelly's decree vested in the purchaser all the right, title, interest, claim, and demand, which both Evans and Bolling had in and to the land; and that therefore the purchaser at the second sale took nothing.

CHILTON, C. J.—The decree of the chancellor is clearly correct. The bill concedes that Hair has the legal title to the land in controversy, and seeks to make him a trustee for the complainant, Griggsby, who insists that he is the equitable owner, having purchased it under a decree ordering a sale for the purchase money, whereas Hair only acquired the equitable rights of Evans,—an equity subordinate to that which exists in favor of the vendor by virtue of his lien for the purchase money. It is quite clear, however, upon an examination of the record, that the decree, under which Hair purchased,

was rendered upon a demand which not only created a lien upon the land, being for a portion of the purchase money for the same, but a lien older, as between these parties, than that set up in the bill of Griggsby. The notes upon which the decree of the Messrs. Kelly was predicated, appear to have been transferred by Bolling before the transfer to Keeland; and the rule is settled, that where several notes are secured by mortgage, and they are assigned at different times, the assignment of each note is, *pro tanto*, an assignment of the security, and the liens of the several assignees are to be preferred, according to the priority of the assignments, without reference to the maturity of the notes.—Nelson & Hatch v. Dunn *et al.*, 15 Ala. 501; Cullum v. Erwin, 4 *ib.* 452; 2 Story's Equity Juris., § 1233, p. 600, n. 1, 3rd ed.; Hop. Ch. Rep. 569.

Liens for the purchase money are regarded in the nature of equitable mortgages, and we see no reason why the rule above referred to should not be applied to them. It is true, if a note is assigned without recourse by the vendor, it amounts to an abandonment of the lien on his part, and his assignee can work out no equity to subject the land through him. But whether or not the parties intended to abandon such lien, is a matter of fact to be gathered from the evidence, and the nature of the transaction.—Hall's Ex'r v. Click, 5 Ala. 363.

It may safely be asserted, as a principle deducible from the decisions of this court, that where the vendor transfers a note, secured by a lien of this nature, either by endorsement or delivery, and binds himself for its payment to the assignee or transferree, the lien on the land, unless expressly waived, is retained, and passes as an incident to the note, and may be enforced by the assignee. The contrary doctrine, as intimated in the decisions of some of the courts, has been rejected as unsound by our predecessors.—See Roper v. McCook & Robertson, 7 Ala. 323, where Collier, C. J., said, "the reasoning on which they rest is by no means satisfactory, and they lead to consequences which should be avoided."

It appears, however, that in the bill filed by the Messrs. Kelly it is averred, that Bolling transferred the notes *without recourse;* and under the decision of Hall v. Click, *supra*, the

chancellor refused to make a decree to enforce the vendor's lien, but rested it upon the ground that the complainants had obtained a judgment, and exhausted their legal remedy, upon one of the notes, as against Evans and Arrington, and consequently had the right to file a bill to subject the equitable interest of Evans, as well as the legal title of Bolling, to its satisfaction.

The averment, that the notes were assigned or transferred without recourse on Bolling, as we have said, was not correct, as is shown by the proof in the record now before us. It was evidently a mistake or inadvertence of the complainants or their solicitor; but without stopping to notice the effect which the proceedings had upon that bill may have upon a subsequent suit to enforce a lien, should one be filed by the Kellys, it is sufficient for the purpose of this decision, that the decree, coupled with the sale to Hair, passed all the title, both legal and equitable, which Bolling and Evans had in the land, to Hair. There was nothing, therefore, upon which the subsequent decree could operate, and we agree with the chancellor, that so long as the decree under which Hair's title was acquired remains unreversed, that title must remain unaffected by any subsequent decree rendered in a suit to which neither the Kellys, Bolling, nor Hair, were parties.

Let the decree be affirmed.

MARRIOTT & HARDESTY *vs.* LEWIS.

1. Plaintiffs in attachment having assigned for error the several rulings of the court shown by the bill of exceptions in the admission and exclusion of evidence on the trial, while the judgment entry (only reciting that the garnishee answered orally denying all indebtedness to the defendant in attachment, and that it was therefore ordered by the court that he be discharged) excluded the idea that there was any trial, or that the garnishee's answer was even controverted, *the judgment was affirmed, and the rulings of the court set out in the bill of exceptions were not considered.*

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. GEO. D. SHORTRIDGE.

WATTS, JUDGE & JACKSON, and R. O. PICKETT, for the appellants.

ELMORE & YANCEY, *contra.*

LIGON, J.—We have held, that to sustain the regularity of a judgment of the Circuit Court, when it appears by the minute entry that an issue was tried by the jury, we will presume that a proper issue was presented for their consideration, notwithstanding no pleas or issue whatever appears in the record.—Eastland v. Sparks, 22 Ala. 607; Lucas v. Hitchcock, 2 *ib.* 287. But we apprehend that when the record shows no issue, and no finding by the jury, or, as in this case, furnishes no evidence whatever that a jury ever was empannelled to try the cause in the court below, no such intendment will be indulged. The party complaining of error must show its existence, and this court will presume nothing against the regularity of the judgments in Circuit Courts.

When these rules are applied to the record in this case, we are compelled to affirm the judgment of the court below.—The bill of exceptions sets out several rulings of the court below, predicated upon objections made to the admission and exclusion of testimony on the trial of the case; when the minute entries of that court exclude the idea that any issue was ever made up between the parties, or that any trial was ever had before a jury. There is no finding of the jury, and no judgment on such finding. Neither does it appear that an issue was made between the parties, and by consent the court was substituted for the jury. Indeed, it does not appear that the case in the court below was ever in such a condition as to authorize either party to introduce any proof, or to justify the court in hearing evidence.

The proceeding was by garnishment, and the judgment entry recites, that "the plaintiffs came by attorney, and the garnishee in proper person, and said garnishee answers, in open court, orally, and denies that he has any sum or sums of money, goods and chattels, or *choses* in action, in his hands, subject to the plaintiffs' garnishment." The judgment immediately follows, and is in these words: "It is therefore ordered by the court, that said garnishee be discharged, and recover his costs," &c. There does not appear anything to jus-

tify the conclusion that the truth of the answer was called in question by the plaintiffs below, or that any application was made by them for a jury for any purpose; and certainly the law does not require their intervention before the court can order the discharge of the garnishee on the answer found in this record, when it is undisputed by the plaintiffs.

There is a bill of exceptions in the record, signed by the presiding judge, which states, that on the trial of the cause the garnishee offered to read a certain deed "*to the jury*," which was objected to, but the objection was overruled, and the plaintiffs excepted. We cannot, however, presume from this, (and it is the only mention or trace of a jury in the whole record,) that there was in fact an issue, and a verdict of a jury thereupon, especially as the balance of the record is of a character which forbids this presumption, and the judgment on which the appeal is prosecuted is utterly repugnant to it. That judgment which we have already set out is the act of the court, without being predicated on the verdict of a jury.

Amidst this confusion in the record, it is difficult even to conjecture what real necessity there was for the evidence to which exception was taken, or indeed for any testimony.— The truth of the answer of the garnishee was not called in question, or disputed ; no issue was made on it under the statute, (Clay's Dig. 60, § 25,) and until this is done the answer must be taken as true, and no evidence can be received to contradict it. It may be, the testimony was ruled out by the court for this reason, and the deed allowed to be read only as an exhibit to the answer of the garnishee. It is certain, that neither the bill of exceptions, nor the other parts of the record, show enough to put the court below in error.— This the appellant must show, or this court will not reverse.

Let the judgment be affirmed.

LOVE & CO. *vs.* DAVIS.

1. A receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port without instructions from his principal, and direct its delivery on arrival to a commission merchant.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. THOMAS A. WALKER.

D. C. HUMPHREYS, for the appellants.

J. W. CLAY, *contra.*

GOLDTHWAITE, J.—The appellants were factors for receiving and forwarding cotton at Whitesburg, on the Tennessee river, and received of the appellee nine bags of cotton, for which they gave the following receipt:

"W. D.—No. 1, 455; 2, 450; 3, 460; 4, 394; 5, 492; 6, 518; 7, 400; 8, 421; 9, 413—4009lb. Whitesburg, 12 Apl., 1851. Received of W. Davis nine bales cotton, marked as above, in first rate order.

(Signed) J. C. LOVE & Co."

They shipped this cotton, without any orders from Davis, to Bradley, Wilson & Co., commission merchants at New Orleans, by whom it was sold, and the proceeds remitted to their office at Huntsville, and there held by them subject to the order of the appellee, who, after the sale, by his agent made a demand of the cotton, and, on their failure to deliver, brought his action to recover the value of the same. On the trial, the receipt, demand, and failure to deliver were proved; and the appellants then offered to show, that, when the demand was made by the agent, they informed him that, without any authority having been given, they shipped the cotton to Bradley, Wilson & Co., in New Orleans, who sold it, and that the proceeds were in their hands at their office in Huntsville, ready to be paid to him, or the appellee; that the agent went to the office of Bradley, Wilson & Co., and saw the account of sales, but declined receiving the money. This evidence

was, on the motion of the appellee, excluded from the jury, and the action of the court in this respect is assigned for error.

The ground taken by the counsel for the appellants is, that an authority to ship the cotton to the receiving port was to be implied from the absence of any instructions by the owner as to the disposition of the cotton, and from the fact that the appellants were receivers for forwarding cotton; but if instructions had been given them to forward the cotton, we do not think they would have been authorized to go farther, and place it with a commission house, unless under special circumstances, and then only for safe-keeping, and to be held subject to the order of the owner. The duties of a forwarding merchant, as to the delivery of goods, are not unlike those of a common carrier. He could forward the goods to the place of destination, but he would have no authority to direct their delivery on arrival to any other person than the owner, unless under some special contract, custom, or usage of trade.—Duff v. Budd, 3 Bro. & Bing. 177; Bodenham v. Bennett, 4 Price 34; Binkett v. Willan, 2 B. & A. 356; Stephenson v. Hart, 4 Bing. 476; Ostrande v. Brown, 15 Johns. 39. Indeed where the goods were consigned, and the consignee refused, or was unable, to receive them, it has been held that the carrier was not at liberty to leave them on the wharf, but that it is his duty to take care of them for the owner.—Mazell v. Potter, 2 Johns. Cas. 371; Stephenson v. Hart, *supra*; Story on Bail., § 545. The evidence offered could only have been admitted on the principle that a forwarding merchant has the general right, without any instructions from the owner, not only to forward the goods, but to direct their delivery on arrival to a third person, without any restriction as to holding them subject to the order of the owner. If this receiver had not this right, the evidence was irrelevant, and was properly excluded. We have found no case, which goes to this extent, and it is opposed to all the analogies of the law of bailments. In our opinion, the court committed no error in rejecting the testimony.

What we have said is decisive of the case upon the other points; the charge requested being in conflict with the views we have expressed, and the charge given in conformity with them.

Judgment affirmed.

BRADFORD *vs.* HARPER ET AL.

1. When a vendee holds only a bond for titles to be made on full payment of the purchase money, a purchaser from him cannot be regarded in equity as a *bona fide* purchaser for valuable consideration without notice, although he saw in the vendee's possession his notes for the purchase money; the conditional bond is sufficient to charge the purchaser with notice of the vendor's lien for the unpaid purchase money, and to put him on inquiry as to the facts.
2. If the vendor transfers to a stranger the notes given for the purchase money, and accepts for them a bill of exchange, his lien on the land is gone, and the vendee, on making full payment to the transferree, becomes entitled to an absolute conveyance; but if the transferree was acting as agent of the vendee, or was jointly concerned with him in the purchase, and made the arrangement for their joint benefit, without an express promise on the part of the vendor to receive the bill of exchange in absolute payment of the notes, and thereby to abandon his lien, the land is still bound to the vendor for the payment of the purchase money on the non-payment of the bill.
3. When the vendee files a bill to compel a conveyance, and to enjoin the vendor's action at law to recover possession of the land, the tenant in possession, being directly interested in perpetuating the injunction, is not a competent witness for the complainant.

ERROR to the Chancery Court of Tallapoosa.

Heard before the Hon. WYLIE W. MASON.

THIS bill was filed by the defendants in error, who are the heirs-at-law of John Harper, deceased, against Jacob T. Bradford and others; its object was, to obtain a title from said Bradford to a certain tract of land, and to enjoin him from further proceedings at law to recover possession thereof. The bill alleges, that said land belonged to said Bradford and one Nathaniel Killough, either jointly or as partners, and was sold by them in 1837, to one Daniel Neves for $1200; that $100 of the purchase money was paid in cash by said Neves, and for the balance he executed his promissory note to said Killough, who thereupon executed a title bond to said Neves, conditioned to make him an absolute conveyance upon full payment of said note; that said Neves afterwards sold the land to one James Murray, and transferred the said title bond; that said Murray afterwards sold the land to said

John Harper, and by agreement between them and said Neves, Murray transferred said title bond back to Neves, who thereupon executed his individual title bond to said Harper; that said Neves has since taken up his said title bond, and instead thereof has assigned Killough's said bond to complainants; that the possession of the land passed with each transfer of the title bond, and valuable improvements have been erected; that said Bradford transferred Neves' said note for the purchase money, before its maturity, to one Job Taylor, and took from him in full payment and satisfaction thereof certain promissory notes and bills of exchange on other persons, and also a tract of land; that said Neves afterwards paid the full amount of said notes to said Job Taylor, and that said Harper's note has also been paid in full; that said Bradford has commenced an action of ejectment for the recovery of said land, and has the legal title thereto.

The answer of Bradford, who is the only material defendant, admits the sale from said Killough to Neves, and states that he had previously sold said land to Killough, and had given him a bond for title; that he had no interest whatever in the land at the time of Killough's said sale to Neves, except to aid Neves, at his request, in making the purchase; that he afterwards purchased from Killough Neves' said note for the purchase money, and agreed to fulfil his contract with Neves, of which the latter was informed; that said Neves and Job Taylor were partners in the purchase of said land from Killough; that afterwards, on demanding payment of said note from Neves, the latter informed the agent, through whom the demand was made, that said Job Taylor, who was then absent, was his partner in said land, and when he returned they would pay said note; that respondent afterwards called personally on said Taylor, and demanded payment of said note, when said Taylor informed him that he had not then money on hand to pay said note, and proposed to give a bill of exchange with good endorsers, which respondent accepted; that said bill was afterwards protested for non-payment, and respondent subsequently obtained a judgment on it against all the parties for about $1200, which judgment remains unpaid except as to about $200 collected out of one Young's estate, all the parties thereto being dead, or insol-

vent, or discharged under the bankrupt law. He insists that the acceptance of said bill of exchange was not a payment of said note, but only a change in the mode of payment; denies all knowledge of the several sales and transfers mentioned in the bill; and offers to convey a good title to the land on receiving full payment of the purchase money yet due and unpaid.

The proof, so far as it is material to an understanding of the case, is stated in the opinion.

The chancellor held, "that Bradford's answer, when taken in connection with the proof, clearly showed that his lien upon the land was lost by the acceptance of the bill of exchange, and that Harper was a *bona fide* purchaser for valuable consideration without notice, and therefore his equity was superior to Bradford's." He therefore granted the relief prayed by the bill, and his decree is now assigned for error.

WHITE & PARSONS, for the plaintiff in error:

1. It is clear that the vendor of land, who takes a note for the purchase money, and gives bond for title when it is paid, retains a lien on the land which will pass to the assignee of the note, or transferree, unless it is expressly agreed that it shall not.—Haley v. Bennett, 5 Port. 452; Chapman v. Chunn, 5 Ala. 397; Roper v. McCook, 7 *ib.* 318.

2. The next question is, whether, in the case made by the record, the defendant Bradford, who is the holder of the note given for this land, has lost this lien. The bill charges that one Job Taylor paid off this note in full, to Bradford, by giving him other notes, or a bill of exchange, and a piece of land. The answer denies that the note was paid off, and gives the true history of the transaction. The answer shows it was a change in the mode or manner of payment merely, and not a payment. The bill of exchange was taken to raise money, and was made payable at the Bank, where the parties expected to get it discounted. It was not paid by the parties to it. There was no agreement that the bill should be taken in payment of the $1100 note charged in the bill, and Bradford denies there was any, and there was no proof of any.—It is not the note, but the debt, which constitutes the lien, and this was put into a new form by taking the bill, and ev-

idenced by a new paper. The right of the vendor does not depend upon the fact that the debt is evidenced by a note, but because the debt was due; the right of a creditor to set aside a gift by a father to his son, is not lost by his giving up three several notes which evidenced the father's indebtedness to him, and taking another new note for the full amount.—Moore v. Spence, 6 Ala. 506. If this is the effect of the arrangement between Bradford and Job Taylor, then Neves was entitled to a deed to the land, the instant after it was made, and that too without any regard to whether he had paid for it or not. This is the very evil which this court says should be prevented, in Roper v. McCook, 7 Ala. 324, viz.. Neves might hold the land without paying anything for it.

Some stress is laid on the fact, that a bill of exchange was taken in lieu of the note given up to Taylor, the partner of Neves, (as Bradford's answer charges, and as the proof made by Sawyer and Morris clearly establishes,) with other parties to it, and on which Neves was not bound ; but this can have no weight. Suppose this bill of exchange had been taken in the first instance, without Neves being a party to it, could Neves assert that Killough had no lien ? Clearly not. If Killough had made a deed, then, perhaps, the lien would be gone, or waived, by taking the bill of exchange (3 Ala. 302; 5 Ala. 399); but here the express condition of the bond, " to make title when the money is paid," would be an unanswerable argument against such a construction. Is it not equally unanswerable when applied to the facts of this record ? What was Bradford's object? It was to get the debt, the money, not another promise to pay it merely. This he had already, and there is nothing in the record to show that, by reason of insolvency, or the apprehension of it, on the part of Neves. Bradford had any occasion to change it. The bill does not pretend there was anything like this.— Again ; why was not the deed called for at the time ? Why was not some showing given that the purchase money was paid up ? All these are strongly persuasive to show that it was not regarded, at the time, as a payment. But the case on this point seems to be put at rest, by a recent decision of this court, in which it said, " the lien will not be lost by the assignee extending the day of payment, and taking a new note

for the purchase money in his own name, but will continue to attend the debt until it is paid or extinguished, or the lien itself is destroyed by contract between the parties."—Conner v. Banks, 18 Ala. 42. Giving up the note does not extinguish the debt. "What amounts to a payment is a question of law, depending upon the facts and circumstances of the case."—Foreman v. Hardwick, 10 Ala. 327.

Another strong circumstance is evidenced by this record. The bill charges that the note for $1100 was paid off by Taylor, in the manner already considered, before it was due, and that Neves paid it off to Taylor in full, in cash, before it was due, and that the bill of exchange was given at the time it was done. The answer of Bradford shows that the transaction with Taylor was about seventeen months after the note was due; and the proof of the witness Charles Stone shows that the bill of exchange is dated on the 7th day of June, 1839. This shows the allegations of the bill, in these two particulars, are false, in the most clear and convincing manner. The bill charges that Neves paid the note to Taylor in cash; the answer denies all knowledge of it, and calls for proof, but none is made. The witness Murray (and perhaps Land) speaks of Neves saying he had paid it in land; but their proof on this point was ruled out, and very properly, by the chancellor.

It is also insisted that the witness Land is incompetent by reason of interest. The bill charges he is one of the defendants in the action of ejectment, and his answer admits it. If this injunction is made perpetual, he is relieved from liability for costs and damages by way of rent. Mrs. Harper, his co-defendant, might with equal propriety become a witness. Her interest differs only in degree. There is no order authorizing the plaintiffs below to take the deposition of this witness, who is a defendant to this bill. Both these grounds were stated in the cross interrogatories, and were overruled by the court below, as appears by the decree. James Murray, another defendant to this bill, was also examined, and objected to by Bradford, because of interest, and also for want of a proper legal order. These were overruled in the court below, and are now insisted on. Murray's interest is clearly shown; he bought the land of Neves, and sold it to John Harper, the ancestor of the several complainants in this bill, and gave his

bond for titles. After the death of John Harper, Murray made an arrangement with Bannister Harper, one of the executors of John Harper, by which he took up his bond, and assigned the bond that Killough had given Neves for titles to Bannister Harper as executor, and agreed with him that he should have no further trouble about the title. This agreement did not relieve him from responsibility, and so the bill charges he has an interest in said land and in said action of ejectment. He is actually the man who sold the land to these complainants, and is now a witness to prove their right to it. It is hardly possible to put a clearer or stronger case of interest than this.

The bill charges that Killough, together with Bradford, sold the land to Neves, and that they were interested as co-partners, at the time, in the land, or each had an interest in it, and they sold it as partners. The answer of B. denies this, and says he had no interest in the land, and did not participate in the sale of it, except possibly to aid Neves at his (Neves') request to make the purchase. This answer is not overturned by proof of the contract or interest charged. The witness Land proves that Bradford said Killough had no interest in the land, and sold for him, &c. There is not a shadow of proof to establish that B. participated in the sale as charged, that is, one holding out offers and inducements to another to purchase, which should estop him, or which amount to a fraud. In the absence of these facts, how can the plaintiffs divest Bradford's title in their favor on a bond given by N. Killough, to which B. is not a party? If it were shown that B. had induced Neves to make the purchase, or had represented the land as Killough's, or that he had done any act by which good faith requires he should be estopped, then there would be some ground for the application. But Bradford denies all such allegations expressly, and says that he is still ready and willing to carry out the agreement he made with Killough—make title when the purchase money is paid. The complainants have failed, therefore, to show such a contract substantially as they have declared upon, and this is a fatal defect, according to the well-settled decisions of this court.—Jordan v. Roney, 23 Ala. 758; 14 *ib.* 135; Danl. Ch. Pr. 1000; Owens v. Collins, 23 Ala. 837.

But there is no averment that Killough is insolvent. It is charged that he resides out of this State, and that he has no property within this jurisdiction to respond in damages; but this is not sufficient. It must be shown that he is insolvent. Cave v. Webb, 22 Ala., and authorities cited.

GEO. W. GUNN and B. J. WHATLEY, *contra:*

A vendor's lien is a mere equity, founded on the presumption that he looks to the land as security for the purchase money, and that the land is held in trust for its payment; and as such, whatever overcomes or repels this presumption destroys this equity.—Young v. Wood, 11 B. Mon. 128. Equity holds that the vendor, as a mortgagee, has three distinct remedies: a bill to foreclose and sell the land; an action of ejectment to recover the land; and an action at law to recover the purchase money. But the first remedy cannot be used when the lien has been waived or discharged, and the second will be enjoined whenever the lien has been discharged by any subsequent contract or agreement on the part of the vendor. A vendor's lien may be waived or repelled by acts and circumstances which would not destroy the lien of a mortgage. A subsequent agreement, materially changing the previous rights, remedies and liabilities of the parties, independent of the idea of estoppel, destroys the lien.—Pritchard v. Ingersoll, 11 Ala. 17; Lightfoot v. Strahan, 7 *ib.* 444. A vendor's lien is lost by taking personal security (Foster v. Trustees of Athenæum, 3 Ala. 302; White v. Dougherty, Mar. & Yer. 309; Brown v. Murphy, 6 Blackf. 272), unless the taking of such security formed a part of the contract of purchase, as in Chapman v. Chunn, 5 Ala. 327. A vendor's lien is also lost in all cases where the vendee, by subsequent agreement, is released or discharged from the payment of the debt by the act of the vendor or his assignee.—Martin v. Lundie, 6 Ala. 427. Nor can the vendor's lien be enforced, at the suit of his assignee, when the note was assigned without recourse (Hall's Ex'rs v. Click, 5 Ala. 363; 7 Gill & J. 120); nor, where the vendor has taken a mortgage, and neglected to have the same recorded, can the same be enforced against a subsequent purchaser without notice.—3 Gill & J. 425.

These positions are particularly applicable as between the

original parties to the contract of sale. This equitable lien, however, only exists as against the vendee and those claiming under him with notice (Ridgely v. Iglehart, 3 Bl. 540); while the case made by this record is that of an innocent purchaser without notice. Harper purchased and paid for the land *bona fide*, with the evidence afforded by Neves' possession of the note given for the purchase money, showing that it had been paid; and his vendor (Murray) was also an innocent purchaser without notice. Having thus purchased *bona fide*, without notice, entered into possession, and erected valuable improvements, he is entitled to the protection of a court of equity.—Molloy v. Stodder, 6 Ala. 801; Myers v. Peak's Adm'r, 2 *ib.* 548; Fenno v. Sayre & Converse, 3 *ib.* 458; 7 Wheat. 46; 1 Dev. & Bat. Ch. 333; Mart. & Yerg. 89; 5 Humph. 568; 2 Miss. 110. The rule held in Burns v. Taylor, 23 Ala. 255, that where the condition of the bond was to make title on the issue of a patent, the presumption was that the purchase money had been paid, and the vendor's lien was lost in the absence of express notice, applies with full force to this case.

Bradford's acceptance of the bill of exchange from Taylor, Young and others, and his delivery of the note to Taylor, and by the latter to the maker, who was no party to the bill, was a full discharge of the note and of the vendor's lien.—French v. Price, 24 Pick. 13; Fowler v. Bush, 21 *ib.* 230; Scott v. Ray, 18 *ib.* 360; 4 *ib.* 444; 2 Metc. 168; *ib.* 157; Holman v. Barclay, 3 *ib.* 55; Cole v. Lockett, 1 Hill 516; Shaw v. Godhin, 7 N. H. 16; Stearns v. Godfrey, 4 Shep. 158; 2 Dana 91; 11 Gill & J. 11: Bank of Commonwealth v. Ray, 7 J. J. Mar. 272; Reed v. Upton, 10 Pick. 522; Jones v. Kennedy, 11 *ib.* 125; Watkins v. Hill, 8 *ib.* 522; Baker v. Briggs, 8 *ib.* 122; Wood v. Bodwell, 12 *ib.* 268; 6 Mass. 143; 9 Wend. 122; Wiseman v. Lyman, 7 Mass. 286; 13 Mees. & W. 828; 5 Term R. 513; 2 Por. 401; 2 Ala. 747.

The defendant has not placed himself in a position to assert a vendor's lien. To do this, he must become an actor: he cannot ask anything by his answer, except to be dismissed from the court.—Cullum v. Erwin, 4 Ala. 452; Cummings v. Gill, 6 *ib.* 562.

The evidence of the witnesses (Johnson, Land and Morris)

fully overturns the answer, and establishes beyond a doubt that Bradford was interested in the lands at the time of the sale by Killough; as such, his presence and participation in the sale, and his delivering up the vendee's note, estop him from attempting to assert either an ownership to the land or a lien upon it.—Town v. Needham, 3 Paige's Ch. Rep. 545; Steele v. Adams, 21 Ala. 534; McCravey v. Remson, 19 *ib.* 430; Burns v. Taylor, 23 *ib.* 272.

The witness Land was a mere agent or overseer of complainants' testator, and a mere formal party to the bill; and Murray had been discharged from all liability on account of the title. As they had no interest in the proceedings, each was a competent witness; and their filing answers does not render them incompetent.—Burns v. Taylor, 23 Ala. 255; Bean v. Pearsall, 12 *ib.* 592; Colgin v. Redman, 20 *ib.* 650.

The defendant's answer is not such an answer as the court will regard with favor; it is a studied evasion of all the material allegations of the bill, and, in addition to this, it is positively contradicted in several important particulars.

There is no material variance between the allegations and proof.

CHILTON, C. J.—The complainants in the court below, holding a bond for title to be made when the purchase money is paid, ask that Bradford may be enjoined from proceeding at law upon his legal title, asserting that he holds the same as a trustee for them, and praying that he may be divested of the title, and that it may be conferred on them as heirs of a derivative purchaser from Neves, who bought of Killough, and who has made full payment for the land.

Bradford insists that the land has not been fully paid for; and whether his lien exists or has been abandoned, depends upon the effect of the arrangement entered into between him and Job Taylor, to which we shall presently recur.

Something has been said as respects the protection due to the complainants as *bona fide* purchasers for a valuable consideration,—that they saw Neves, with a bond for title, and with his note which he had taken up, and therefore had the right to conclude that the purchase money had been paid. The decree of the chancellor is based, in part, upon this idea.

But the doctrine does not apply to such a state of facts. The fact that Neves held but a bond for title, and this title to be made on condition of full payment, must charge every one who purchases from him with notice of the lien existing for the purchase money. The possession of the note, formerly held by Killough and transferred to Bradford, would be conclusive against the lien, if it could have been obtained in no other mode than by payment; but we know that the evidences of demands are often changed and renewed, while the debt, of which they are but the evidence, still exists; and such renewals have never been held, *ipso facto*, to discharge the security provided by the principal debtor for the payment of the demand. If Neves had held a deed for the land, then the case would have been very different. There would, in such case, have been nothing to put the complainants on inquiry: seeing that he had a title absolute on its face, the purchaser might well have reposed upon it. But he has a bond, and the inquiry by a prudent purchaser very naturally and readily would be made, why the bond providing for payment, if payment has been made and the obligation for a title has become absolute? Why not either a deed, or an absolute engagement to make a title? The facts, being thus elicited, we must presume, would have been stated to the purchaser, and in this way he would have been informed that, after the note of Neves to Killough fell due, Killough's transferree, who held both the note and the title to the land, under an agreement with Killough to make title when the note was paid, took a bill of exchange drawn by Salmon Washburn on Job Taylor, in favor of Benjamin Young, and endorsed to Bradford, for $1000, and a tract of land from Job Taylor, and delivered over Neves' note to Taylor. The question would then come up, Was this a payment of the demand, so as to work a forfeiture of the lien? and this is the main question for our consideration.

The bill charges that the acceptance of the bill of exchange and surrendering up Neves' note by Bradford, was a payment of the note, and consequently a discharge of the lien. It further charges, that Neves afterwards paid Taylor the amount of the note, which entitled him to be discharged from all further liability on account of the purchase money. These

charges are denied by Bradford, who insists that Neves and Taylor were partners in the purchase of the land, and that the receipt of the bill of exchange from Taylor was but the renewal of the evidence of the debt, taking cumulative security as a means of discounting the bill in bank, and thus raising money.

We think it very clear, that if Taylor was not a partner of Neves, nor acting for him in the matter of the negotiation, and took up this note as an individual transaction, and gave the bill in exchange for it, then the lien of Bradford is gone. Neves, in that event, would be no longer his debtor, but the debtor of Taylor, and upon payment to Taylor of the amount of the note, would discharge the condition of the bond as to the purchase money, and entitle himself to a conveyance. On the other hand, we think it equally clear, that if Neves and Taylor were jointly concerned in the purchase, although by a verbal arrangement between them, and Taylor, acting for both, caused this bill to be executed, and took up the old note, without any express agreement on Bradford's part to receive it in absolute payment, and thereby to abandon the lien, he still has a right to look to the land to pay the balance due.

We must then look to the allegations and proof to solve this question. As we have said, Bradford denies the allegation that the bill was received in payment. The *onus* is therefore cast upon the complainants, to make proof of the fact by two witnesses, or one with strong corroborating circumstances. Let us see whether they have done this.

Alfred Johnson testifies, that he learned from conversations with Neves and Taylor that the latter had no interest in the land which is the subject of controversy; that Bradford told this witness, that he, or he and Killough, had sold the land to Neves for $1100; that he also said that Taylor drew his bill of exchange for the amount of the purchase money; that Benjamin Young and Salmon Washburn were the endorsers on the bill, and he (Bradford) accepted the same, and drew the money on it; said the bill was drawn for the purpose of taking up the old note for the purchase money,—that he had collected of Benjamin Young $400 or $450, and the balance he himself had to pay into bank; that the reason why he took the bill, and gave up the old note, was, that he considered Taylor

good; that the bill was taken in exchange for the note on Neves. "He spoke to witness as though he did not know Taylor in the transaction up to the time of drawing the bill of exchange, and said he was satisfied that, inasmuch as Neves' note had been cancelled by the bill, he would lose the purchase money, unless he could discredit the testimony of Neves; said that he looked to the land for the purchase money." This conversation, the witness states, was in 1848 or 1849, or after the commencement of this suit; witness does not give the language, but the substance as near as he remembers, of what Bradford said, and says no one was present at their conversation.

With respect to the testimony of this witness, it will be observed that it consists of the statements of Bradford to him; and allowing him full credit for honesty and fairness, it is manifest that much of what is said as coming from Bradford is incorrect. It is said, for example, that Taylor drew the bill, that Bradford accepted or endorsed it, and that Washburn and Young endorsed it; that it was for the amount of the note of Neves, and that he had collected of Young $400 or $450. Now, none of this conforms to the facts; and whether it results from the failure of the witness correctly to apprehend the conversation, or from want of a proper recollection of the facts detailed, or from a misstatement of them by Bradford, without any conceivable motive for so doing, is not material. By recurring to the record of the suit on the bill, we find the facts above deposed to to be otherwise than here detailed; and this want of correctness shows, that this must have been a loose conversation, not had with any view of making testimony out of it, perhaps had without much regard to accuracy, and, it may be, has been badly remembered, and incorrectly stated. Such conversations are but little to be relied upon as safe guides to truth, and such evidence is always received with caution. That portion of the proof made by this witness, which is most material to the case, seems to be stated rather as a conclusion than as a fact. He says, Bradford spoke as though he did not know Taylor in the transaction up to the time of filing the bill. It would have been more satisfactory, if what he said upon the subject had been stated, so that the court, instead of the witness, might have judged of the effect of the conversation.

Solomon Land was examined by the complainants as a witness, and the defendants objected to his testimony on several grounds; one of them being, that he was a party to the suit, and interested on behalf of the complainants. He is one of the parties defendant in the suit which the bill is brought to enjoin—the terre-tenant upon the land which Bradford was proceeding at law to recover. He is, therefore, interested in perpetuating the injunction, which saves him from further defence in the court of law, and from all damages and costs in consequence of a recovery which may otherwise be had against him. The bare statement of the proposition seems to render argument unnecessary to establish his interest. The chancellor erred, therefore, in failing to exclude his deposition, and we must regard the case as though he had not been examined.

James Murray, another witness examined on the part of the complainants, states a most significant fact in relation to the subject under investigation. He first purchased this land, and took the assignment from Neves of Killough's bond for title; and he swears that "the consideration of the first transfer was about one thousand dollars, paid by this deponent to Daniel Neves and Job Taylor, jr.," thus showing that Taylor was interested in the land, as otherwise it is not reasonable that he should have received a portion of the purchase money paid by Murray. Indeed, Murray proves that he bought the land of Taylor himself, notwithstanding the bond was to Neves.

Littleberry Morris proves, that Neves admitted to him that Taylor was jointly concerned in the land, and referred him to Taylor for payment of the $1100 note.

John Sawyer proves, that he took the bill to Taylor and demanded payment, and was referred by Taylor to Neves, who, he said, was jointly concerned with him in the land, for payment. This witness says, he stated to Neves that Taylor said it was a joint matter between them, and Neves recognized it as such.

There is a good deal of other testimony, but none of it materially bearing upon the point under consideration, and we do not think that, when properly considered, it weakens materially the force of the answer.

In view of the evidence, and the issue made by the answer,

we do not hesitate to hold, that the complainants have failed to make out their case. We are of opinion, that it would be inequitable to compel Bradford to part with the title until he is paid for the land, and that notwithstanding the arrangement between him and Taylor, changing the evidence of the demand, it still exists, and the lien for its payment is not destroyed. The evidence satisfies us that Taylor was acting for himself and Neves; and the proof fails to sustain the bill, that Neves paid Taylor the amount of the note taken up by him. Indeed, the character of the transaction itself—the fact that Taylor required no endorsement of Neves' note to him, coupled with the other fact that he referred the agent of Bradford to Neves for payment of the bill, sustained by the denial of the answer—very satisfactorily shows, that the giving of the bill was but an effort to raise money to satisfy the demand—was but the substitution of the bill for the note; and the bill failing of its object in part, to the extent of that failure Bradford has the right to be remitted to his lien as upon the original demand.—See Kean *et al.* v. Dufresne, 3 Serg. & Rawle 233.

It is said, as Bradford files no cross bill, he cannot enforce his lien in this suit, but can only pray to be dismissed the court. This is true. He, however, is pursuing his remedy at law, and does not ask the aid of the court of equity.

It results from what we have said, that the decree of the chancellor must be reversed, and the bill of the complainants must be here dismissed, but without prejudice to their filing a bill to obtain a title upon tendering the balance of the purchase money and the costs of the pending common-law suit, should Bradford refuse to accept the money and execute a title according to the stipulations of Killough's bond. The complainants below must be charged with the costs of this court and of the court below.

Decree accordingly.

JESSEE *vs.* CATER.

1. A chancery suit for the abatement of a livery stable as a nuisance was referred to arbitration by order of the court, and it was ordered that complainant's bill should be dismissed if she did not comply with the conditions of the award by the next term of the court. The arbitrators having awarded an exchange of lots between the parties, and the payment by complainant of the estimated difference in the value of the lots, and the complainant having failed to comply with the award, her bill was afterwards dismissed: *Held*, that the award was not final until the parties had performed, or offered to perform, the acts required to be done by them respectively; and therefore, a plea to an action on the injunction bond must aver performance, or a readiness to perform, on the part of the pleader.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

THIS action (Wm. H. Jessee *vs.* Jemima M. Cater, John W. Lapsley, and Wm. H. Fellows) was commenced by summons and complaint under the Code, and was founded on an injunction bond. The defendants pleaded several pleas, of which it is only necessary to notice the first, as the rulings of the court in reference to it are the only errors assigned.—This plea avers, substantially, that the complainant in the injunction suit had filed her bill for an abatement of a livery stable erected by said Wm. H. Jessee; that the matters in controversy in said suit were afterwards, by an order of the court, referred to arbitration, the order of reference directing that, if complainant did not comply with the conditions of the award by the next term of the court, her bill should be dismissed; that the arbitrators awarded an exchange of lots between the parties, the execution of mutual conveyances by them in fee simple, and the payment by complainant of $850 as the intimated difference in value of the lots; and that this award was returned to the court, was received, confirmed, and recorded.

The plaintiff demurred to this plea; and, the demurrer being overruled, replied, "in short by consent, that said award was under the control of said Chancery Court, and was afterwards set aside by the proceedings of said court in

said cause up to the dismissal of the cause, as shown by the proceedings in said cause hereto attached," &c. The proceedings in the chancery cause are set out, *in extenso*, to the final decree dismissing the bill because the complainant had failed to pay into court the $850 awarded by the arbitrators. Issue was joined on this replication; and on the trial, the plaintiff having introduced in evidence the record of the proceedings in said chancery suit, the court charged the jury, "that, under the issue formed upon the first plea, said record and proceedings did not show that the award mentioned in said plea was set aside, but that said award was valid and binding, and plaintiff could not maintain his action."

The plaintiff excepted to the charge of the court; and he now assigns for error, 1st, the overruling of his demurrer to the first plea; and, 2d, the charge of the court.

GEO. W. GAYLE, for the appellant.

WM. M. MURPHY, *contra.*

LIGON, J.—1. We think it clear that the award set out in the first plea in this case was never intended to be final, as to the matters involved in the chancery suit between the parties, until the things required to be done by it were performed, or offered to be performed by the parties respectively. The matters settled by the award are merely collateral to the controversy on which the reference was made, and the arbitrators go no further than to require the parties to make conveyances to each other on certain terms set forth in the award. In such cases, a plea which sets up and insists on the award, as a bar to an action founded on or growing out of matters connected with the proceedings or issues involved in the suit on which the reference was made, should aver performance on the part of the person pleading it; or, at the least, a readiness to perform.—Clapcott v. Davy, 1 Ld. Ray. 611; Freeman v. Burnard, *ib.* 246; Billings on Awards, 135, 293. The performance by Mrs. Cater is a condition precedent to her claiming any rights under the award of the arbitrators, and as such must be averred in her plea before it will be a bar to the suit on the bond for injunction, brought by Jessee for a breach of its condition. As the first plea in this record

contains no such averment, it is therefore bad, and the demurrer to it should have been sustained.

This award differs from that in the case of McAlpin v. May, 1 Stew. 520. The arbitrators in that case acted directly upon the matters in controversy, ascertained the balance due to the plaintiff, and *unconditionally* awarded its payment. It was full and final in its character; and in such cases, the party pleading it need not aver performance.

2. The charge of the court below was also erroneous. It assumes this award to be final, without any performance of its requirements by either party. We think differently, and hold that the conveyances and the payment of the money awarded, required to be made by its terms, are conditions precedent to its becoming final.

Let the judgment be reversed, and the cause remanded.

SIMONTON *vs.* McLANE'S ADM'R.

1. If one in his lifetime makes a fraudulent conveyance of his property, his grantee may, after his death, be charged as executor *de son tort*, although there is a lawful representative, because the latter, being bound by the fraud of his testator or intestate, cannot be charged at all in his representative capacity; but this doctrine has no application to cases of collusion between the lawful representative and a third person, where there is nothing to prevent the former from being held liable, and therefore the latter cannot be charged as executor *de son tort*.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellee, as administrator of Matilda P. McLane, brought suit against the appellant, as executor of Thomas H. Lightfoot, on a promissory note for $29 60, executed by said Lightfoot, and payable to said Matilda. The defendant pleaded *non assumpsit*, *ne unques executor*, and several other pleas which it is unnecessary to notice. The evidence showed that the defendant had collected and paid out moneys belonging to

the estate of said Thomas H. Lightfoot, and that one A. N. Lightfoot was at the same time the lawful administrator of the estate. The court charged the jury, that, although they might believe that said A. N. Lightfoot was the administrator of said estate, legally appointed and qualified, yet, if there was collusion between him and the defendant to defraud the creditors of the estate, and that defendant, with this intention, collected and paid out funds belonging to the estate, this would make him executor *de son tort*, and plaintiff ought to recover. The defendant excepted to this charge, and he now assigns it for error.

J. Falkner and Geo. W. Gunn, for the appellant, cited 4 Bac. Abr., pp. 28 to 31; Toller on Ex'rs, p. 40; 1 Chitty's Pl. 51: 1 Williams on Ex'rs, pp. 140, 141.

S. F. Rice, with whom was C. D. Hudson, cited Foster v. Nowlin, 4 Missouri R. 18; Hopkins v. Towns, 4 B. Mon. 124.

GOLDTHWAITE, J.—The plea was *ne unques executor*; and evidence was offered that, at the time the defendant below committed the acts for the doing of which he was sought to be charged as executor *de son tort*, there was a lawful administration. The charge of the court was, in effect, that although there was a lawful administrator, if the defendant, in collusion with him, received and paid out the funds, with intent to defraud the creditors of the estate, he could be charged as executor in his own wrong.

We agree that, where one in his lifetime makes a fraudulent conveyance of his property, the person to whom the conveyance is made may, after his death, be charged as executor, although there is a lawful representative; and the reason is, that the latter, being bound by the fraud of his testator or intestate, cannot be charged at all in his representative capacity.—Densler v. Edwards, 5 Ala. 31; Marler v. Marler, 6 Ala. 367. But this doctrine has no application to cases of collusion between the rightful representative and a third person, where there is nothing to prevent the former from being held liable.

It is urged, however, on the part of the appellee, that the

evidence in the case shows, that there was no lawful representative until after suit brought; and one of the appellant's witnesses does state that the intestate died in October 1847, while the letters of administration were granted in April of that year. But this was not conclusive: this witness may have been mistaken, and it was for the jury to decide. The charge did not place it upon that ground, but told the jury, that, although there was a lawful administrator at the time the defendant collected the money, he was responsible if fraud was made out. If there was such an administrator, the defendant would have been liable to him, but not to the creditor, unless, indeed, he claimed to act *as executor*, in which case some of the old cases hold that he would be liable, on the ground that he is not allowed to deny the character he has taken upon himself (Read's case, 5 Co. 34); but this has since been denied to be law by Lord Kenyon, in Hall v. Elliot, N. P. C. 87, and Sir Thomas Plummer, in Tomlin v. Beck, 1 T. & R. 438. What we have said will be sufficient to dispose of the case on another trial.

Judgment reversed, and cause remanded.

PERRY *vs.* MERCHANTS' INSURANCE CO.

1. When a policy of insurance is assigned after a loss has accrued, the assignee may maintain an action on it in his own name, either under the act of 1828 (Clay's Digest, p. 383), or under the Code (§ 2129), although it contains the usual stipulation against assignment.
2. The assignee's right to sue is not affected by a stipulation in the policy for its renewal, if it had expired without renewal before the assignment, and the right of renewal was gone with the partial destruction of the property.
3. An assignment of "all the loss or damage which accrued under the policy prior to" a specified day, passes the whole interest in the policy to the assignee, when it is shown that the loss had accrued, and the policy expired, before that day.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action, which was commenced by summons and complaint under the Code, was founded on a policy of insurance executed by the appellee to one Trimble on the "Planters' Press," including the warehouse, press, and machinery, which policy was assigned by said Trimble to the plaintiff. The plea was, "the general issue, with leave to give any special matter in evidence going to show that the plaintiff has no right to recover."

On the trial, the plaintiff produced the policy, which covered twelve months from the 8th of June, 1850, and was renewed for another year after its expiration; and then proved the assignment thereon endorsed, which was in these words: "For value received, I do hereby assign to N. W. Perry all claim or interest I have in any loss or damage which accrued under this policy prior to the 1st day of January, 1853.—Witness my hand, this day of 1853. (Signed) George T. Trimble." "He then offered proof, showing that the loss accrued before the assignment of the policy to him; and there was evidence offered by the defendant, tending to show that the assignment, though after the loss, was previous to the year 1853; and there was no evidence offered by the plaintiff contradicting this proof offered by the defendant, except the date of the assignment as written on the back of the policy, which was dated in 1853, but the day and month were blank. Upon this evidence the court ruled, that the action could not be maintained in the name of the plaintiff; to which ruling of the court the plaintiff excepted, and was forced to take a non-suit." This ruling of the court is now assigned for error.

E. S. DARGAN, with whom was GEORGE N. STEWART, for appellant:

As the loss accrued before the assignment of the policy, the stipulation contained in it, that it should not be assigned without the written consent of the company, did not prevent the assignment; it was the risk, and not the money after the loss, that the company was unwilling should be assigned.—2 Hall's R. 372; 3 Metcalf's R. 69; Duer on Insurance, 2 vol., p. 65; Smith's Mercantile Law, p. 415.

It is immaterial whether the assignment was before or

after the Code went into operation; for the policy, after the loss, was assignable, both under the act of 1828 (Clay's Dig., p. 383), and under the Code. After a total loss, the policy cannot, under either statute, be construed into anything else than a written contract for the payment of money, and is equally assignable under the express words of either statute. It may be said that it is a contract to pay on a contingency; but that does not take from it its assignability.—Brown v. Chambers, 12 Ala. 697; Burt v. Henry, 10 Ala. 874; 10 Missouri R. 675. In Brown v. Chambers, *supra*, the act of 1828 was deliberately construed, and that decision is conclusive for the appellant. The case of Winston v. Metcalf, 6 Ala. 756, did not necessarily involve the construction of the act of 1828, nor did the court undertake to construe it, but the *dictum* of Judge Goldthwaite was confined to the act of 1812. Nor can the case of Carleton v. Waters, 4 Porter, be considered an authority for the defendant: in that case the suit was against the drawee; and the question was, whether the instrument was a bill of exchange. It was correctly ruled that it was not; and although the instrument in that case was not assignable, yet this was not owing to the fact that the undertaking of Campbell & Goldthwaite was to pay money on condition, but to the fact that the instrument created two distinct duties, viz., to use ordinary diligence to collect, and also to pay. An instrument of this compound character is not assignable.—2 Litt. 166, which was followed in 5 J. J. Marsh. 42, and in 7 B. Mon. 547. But where the instrument is to pay money, *or* to perform a duty, in the disjunctive, it is assignable, whether the payment of the money be conditional or absolute.

The suit would have been clearly maintainable under section 1530 of the Code, without any assignment; and to hold that an obligation to pay on a contingency is not assignable, would render a part of that section nugatory. Therefore, to give effect to section 1530, as containing more than section 2129, we must hold that debts due on condition, or contingent debts, are assignable; that is, an absolute debt may be sued by the party entitled in equity to the money, but a contingent debt must be assigned to enable the party beneficially interested to sue in his own name.

R. H. SMITH, *contra*:

Was the paper assignable, independent of the contract that it should not be without defendant's consent in writing? It is a contract in writing, with material stipulations, for the payment of an uncertain sum, upon several contingencies. It was assigned before the Code went into effect, and abides by the law in force when the endorsement was made.—2 Call's R. 232. Defendant insists, 1st, that it is not assignable under the act of 1812, of 1828, or under the Code; 2nd, that it does not fall within the category of those contracts, &c., which under the Code are to be sued in the name of the beneficiary, without regard to the endorsement.

By act of 1812 (Clay's Dig., p. 381, § 6) "all bonds, obligations, bills single, promissory notes, and all other writings for the payment of money or any other thing, may be assigned by endorsement." By judicial interpretation, a paper, to be assignable under this statute, (and the right, after loss under the policy, being a mere *chose* in action, is of course not assignable at common law,) must be without mutual stipulations, for a sum certain, and without contingency.—Henderson v. Hepburn, 2 Call 232; Lewis v. Harwood, 6 Cranch 83; Winston v. Metcalf, 7 Ala. 841; see, also, authorities from Kentucky and Missouri, cited in 12 Ala. 708. Hence the policy is not assignable under this statute.

Is it assignable under the act of 1828 (Clay's Digest, p. 382–3, preamble, and §§ 11, 12)? The preamble to this act shows, that its object was to define the liability of endorsers, and not to enlarge the class of assignable papers. After prescribing the liabilities of endorsers of commercial paper in section 11, it provides, by section 12, that "all contracts in writing for the payment of money, or property, or performance of any duty, of whatever nature, shall be assignable as heretofore," There can be no pretence that this act enlarges the class of assignable instruments beyond that of 1812, unless it does so by the comprehensive words, "contracts for the performance of any duty, of whatever nature"; and as the contract sued on is for the payment of money, and not the performance of a duty, it follows that the act of 1828 can in no wise give it an assignable character, unless it had it by act of 1812. Even if it contained provisions for the perform-

ance of duties by us, and even conceding such to be assignable, defendant is not sued for a breach of them, but for non-payment of the money; and though it might be a good assignment of the breach of duty part, it passes no right to sue for the money.—Winston v. Metcalf, 7 Ala. 841. But the act of 1828 does not enlarge the class of assignable contracts. It refers to those before assignable, in order to fix the law of liability of endorsers, and then, through caution, declares they shall be assignable "as heretofore."

But it is said Brown v. Chambers, 12 Ala. 697, shows the paper to be assignable. That suit was on a bond for the conveyance of lands, on conditions to be performed by obligee. Judge Collier says, in effect, that the act of 1828 enlarges the class of assignable paper, by adding, "all contracts for the performance of a duty," that the bond was such, and therefore assignable. Concede it, and this in no wise proves that a contract for the payment of money is.

But that decision is a very remote dictum. 1. The order of sale, under which the bond passed, was held *coram non judice* and void. 2. The bond itself was void, the contract being a fraud on the pre-emption law.—Hair v. Deal & Lavender, 18 Ala. 798; Martin v. Tennison, 13 *ib.* 29; 12 *ib.* 669; 7 Por. 58; 2 *ib.* 148. 3. The bond was held not to have been assigned by any one having a legal right to endorse it. Then here is a void bond, passed on a void sale, that never was endorsed. Collier, C. J., holds, it could have been endorsed. This is hardly a precedent. The reasoning of Judge Collier would hardly stand criticism. The act of 1828 says, all contracts, &c., shall be assignable "as heretofore." He says, this does not mean, shall be assignable as they were by the act of 1812, but that others set out in the act of 1828 are assignable in the same mode as those set out in that of 1812, and this is by endorsement. But (law or not law) Brown v. Chambers does not touch the question in this record.

The paper which is assignable is by the statute subject to set-off; but a conditional promise to pay an uncertain sum is not subject to a set-off. "Mutual debts" only are subject to off-set; and hence the bond is not assignable by the very language of the act.

Then as to the Code: The authorities cited in 2 Call's Rep.

232 show (what is plain without it) that the law in force when the act was done is the law of assignment. But whether it is or not, section 1530 of the Code, solved by the rule of construction before established, certainly covers no larger class of contracts than the acts before cited. Does the Code authorize plaintiff to sue without endorsement? By section 2129, "every action founded on a promissory note, bond, or other contract, express or implied, for the payment of money, must be sued in the name of the party really interested"; and this means (as before shown) the payment of a sum certain, without contingency, &c.

But it is also insisted for defendant, 1st, that the assignment is void, because made without the written assent of defendant endorsed on it; and, 2dly, because the endorsement does not purport to assign the policy, but is a mere declaration that the money or losses accrued are to be for plaintiff, with a warrant of authority to him to receive.

The policy is renewable from year to year; it covers the building, the machinery, and the press. It is manifest there might be a loss on one, and yet the policy continue as to the others, as was the case. The assignment is of all loss accrued prior to January 1, 1853. The presumption is to be indulged against the plaintiff, that the policy, being renewable from year to year, and beginning in June, continued until June, 1853. The assignment, then, was not of the policy, but of a particular loss under it, the policy continuing as to other matters. The Code cannot be so construed as to allow two or three different persons to sue for different breaches of the same contract.

CHILTON, C. J.—Assumpsit by Perry, as assignee of one Trimble, upon a policy of insurance executed by the appellees. The assignment to Perry was in blank as to date, except the year, which was 1853; but the proof conduced to show that the loss was before the assignment. Conceding this, the question is, whether the assignee can sustain an action on the policy in his own name. The judge of the City Court held that he could not, and thereby forced the plaintiff to take a non-suit, who, under the statute, moves to set it aside in this court.

After a careful review of the statute, and the cases bearing upon this question, we are satisfied that the court mistook the law. The act (Clay's Dig. §§ 11, 12, p. 383), after defining the rules which shall govern the remedy in respect of foreign and inland bills of exchange, and promissory notes payable in bank, declares, that "all other contracts in writing, for the payment of money or property, or performance of any duty of whatsoever nature, shall be assignable as heretofore, and the assignee may maintain such suit thereon as the obligee or payee could have done, whether it be debt, covenant, or assumpsit."

The construction of this act, and the previous statute of 1812 relating to the same subject, came before this court in the case of Brown v. Chambers, 12 Ala. 697, 709-10, and we think the principle settled by that case fully justifies the assignee in this to maintain the action in his own name. The court, in that case, said: "Upon the first presentation of this case, the question presented itself, whether the general terms, 'performance of any duty of whatever nature,' should not be limited to contracts in writing, where the undertaking was absolute and unconditional, although the duty was to be performed *in futuro;* but further reflection and examination has satisfied us, that the assignee of a bond with reciprocal covenants may maintain an action against the obligor in his own name, upon showing that the undertaking of the latter has become absolute, by the performance of the conditions which are incumbent on the obligee."

In the case before us, the loss had accrued, and the money due from the insurers was payable absolutely, when the policy was assigned, and we see no objection to allowing the assignee to sue in his own name. The case we have just referred to, in principle, certainly authorizes him to do so, and we are satisfied with it as a correct construction of the statute.

The policy being assignable by law after the loss had accrued, and the money payable absolutely, the stipulation contained in it, that it should not be assigned, if it was intended to apply to it after the loss, cannot destroy the right of the assignee to appoint the person to receive or sue for the money by a transfer or assignment; but it is manifest from the terms of the policy that it was not intended to apply in such case.

It is insisted, however, that the policy provides for a renewal, and this right was not assigned; and being reserved to the insured by the policy, the whole interest of Trimble was not assigned, and a part of it could not be. Without intimating any opinion, as to what would be our decision, if it had been shown that the right to renew existed at the time of the assignment, we are satisfied that, under the facts of this case, it interposes no obstacle to a valid transfer.

The policy under which the loss accrued expired the 8th June, 1852, and was not renewed. Indeed, the condition of the property had been changed; a portion of it had been destroyed, so that the policy could not, in the nature of things, have been effected *on the same property* as mentioned and described in the application. The right to renew was, therefore, taken away by the destruction which produced the loss. Aside, however, from this, there is no positive right of renewal reserved by the policy after the condition of the property has undergone a change; on the contrary, the conditions of insurance provide that, in such cases, a new representation shall be made by the party insured. Indeed, it may be questionable, whether, in any event, the insurance office is bound to admit a renewal under the phraseology employed in the conditions annexed to the policy. The language is, "insurances once made may be continued for such further time *as may be agreed on*," &c. Be this as it may, it is clear the time for renewal had passed, and the right to renew was destroyed by the loss of the subject-matter, or a portion of it, on which the insurance was effected, before the assignment, thus leaving the policy shorn of this question at that time.

If, however, we were wrong in the construction we place upon the act of 1828, we entertain no doubt that the action is properly brought under the Code. Section 2129 declares, that "every action founded upon a promissory note, bond, or other contract, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he have the legal title or not, subject to any defence the payer, obligor, or debtor, may have had against the payee, obligee, or creditor, previous to notice of the assignment or transfer." This section applies, as it affects the *remedy* merely; and after the loss was fixed, and the right of renewal

gone, the policy was nothing other than a contract for the payment of money.

Something was said in regard to the form of the assignment—that the policy is not assigned, but merely "the loss or damage which accrued under it prior to the 1st January, 1853"; but, if we are right in what we have said, that the assignment was after the policy had expired, and when the liability of the insurers had been fixed, no difficulty can exist upon this point; for the whole interest passes under the assignment. It was conceded at the bar, in the argument by the counsel on both sides, that the policy was renewed but once, and did not continue down to the 1st January, 1853; so that the loss accruing before that period is all that remains to be made good fully to satisfy the stipulations contained in it, and none could have accrued thereafter. It follows that the assignment passed the whole interest.

The motion to set aside the non-suit must be granted, with costs.

ROYALL'S ADM'R *vs.* McKENZIE ET AL.

1. When a bill in equity is filed to compel a settlement and account of an assignment, consisting principally of notes and accounts under twenty dollars against debtors who were residents of the district in which the trustee lived, the trustee, in the absence of all special cause, should be allowed twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time.
2. The trustee's own note, when included in the assignment, should be charged as cash in his hands from the time it falls due.
3. Where the assignor, after the lapse of a sufficient time for closing the assignment, agrees with the trustee that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time.
4. It is the duty of the trustee to use all necessary means, by action or otherwise, to realize the debts; if a debt is lost by his neglect of this duty, where the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive.

5. When the trustee alleges in his answer that the assignor, with full knowledge of all the facts, assented to his settlement of a debt by taking lands in satisfaction of it, this is matter in avoidance, which requires evidence *aliunde* to sustain it.

6. If the trustee, without the sanction of the *cestuis que trust*, receives lands in settlement and satisfaction of the trust debts, equity will hold him responsible for whatever loss may ensue, and, if the *cestuis que trust* so elect, treat the lands as his own individual property.

7. The trustee is not estopped from showing that the actual amount of any debt is less than that specified in the assignment, and he would only be accountable for the actual amount of it.

8. If the deed confers no authority on the trustee to compromise the debts, he cannot compromise them without the consent of the beneficiaries.

9. The trustee is chargeable with the amount of a debt, although the evidence is conflicting as to the debtor's solvency, upon proof that he had had a settlement with the debtor, and had paid him in cash the balance found in his favor.

10. He is also chargeable with rents accruing under a lease included in the assignment, upon his own admission of the lease and proof of the lessee's solvency.

11. Also, with the value of articles of personal property embraced in the assignment, to which he is shown to have asserted title, although he denies that they ever came to his possession.

12. When the order of reference directs the master to take an account of the expenses of executing the trust, and to ascertain what would be a reasonable compensation to the trustee, should the court decree compensation; and the master reports, as a reasonable compensation, a certain per cent. on the amount of the available assets, which are also ascertained and reported under another part of the reference, the report conforms to the reference.

13. A trustee, who, after accepting the trust, voluntarily permits his co-trustee to take the entire management of it, and the possession and control of the trust property, is equally with him liable to account: and on bill being filed against both for an account and settlement of the trust, he is an incompetent witness for his co-defendant to prove the insolvency of the debtors.

14. An answer in chancery is admissible evidence against the respondent, in a subsequent suit, whether the parties are the same or not.

15. A witness may state that "he regards certain debtors as insolvent," if his testimony shows that his conclusion is based upon his knowledge of their circumstances; but not otherwise.

16. An exception to a particular portion of a master's report, embracing a large number of separate and distinct items, should be overruled for its generality; it is the office of an exception to point out the particular item objected to.

17. If the trustee buys up the secured debts at less than their nominal value, he is only entitled, on a settlement of the trust in equity, to a credit for the amount actually paid by him.

APPEAL from the Chancery Court of Macon.
Heard before the Hon. WYLIE W. MASON.

THIS bill was filed, in 1847, by John Foster, as administrator of William Royall, deceased, against John McKenzie and Amasa Howard, to compel a settlement and account of an assignment executed to the defendants by said Royall, in October, 1832, in Lancaster District, South Carolina, where the parties then resided. In 1841 said Royall had filed a bill in the Chancery Court at Talladega, in the name of himself and the creditors secured by the deed, against the said trustees, to compel a settlement of the assignment; but after a reference to the master of the matters of account had been ordered, the suit was compromised on the 30th of July, 1844, by McKenzie allowing a decree to go against him in favor of the preferred creditors, and it was then agreed that the other matters of account should stand open for future settlement.

A reference to the master of the matters of account was awarded, and each party filed exceptions to his report. There are now cross assignments of error in this court, embracing the action of the chancellor upon each one of these exceptions; and as the material facts bearing upon each point are stated at sufficient length in the opinion of the court, a further statement of them in this place is unnecessary.

JOHN A. ELMORE, N. W. COCKE, and WM. C. MCIVER, for complainant:

1. As to the solvency of the debtors whose debts were charged to McKenzie, the complainant's evidence is affirmative, and shows them to have had property; while the defendants' evidence is negative, and not as to facts, but opinion only, and not showing that the debtors had no property.

2. There is no reason in law, nor in the facts of the case, for postponing interest on the available assets for two years. Many of the claims are notes due at the time; and the balance were notes and accounts due January, 1853. H. R. Price, who was clerk in 1831 and part of 1832, could have proved those accounts entered by him, but was never called on to do so by McKenzie. Some of the claims were collected before October, 1834; and all collected bore interest, and McKenzie charged interest, or should have done so. One year is the most that should have been allowed, by analogy to legacies.

3. The account should have been made out up to July 30.

1844, the day of the partial settlement in Talladega; the balance should then have been struck, and interest should have been allowed on that balance until the time of taking the account.—2 Johns. Ch. 209; 2 Hill's Ch. 145; Lewis v. Bradford, 8 Ala. 632, Bryant v. Craig, 12 *ib.* 562; 7 *ib.* 230; 1 Johns. Ch. 620; 3 G. & Johns. 311; Robbins v. Haywood, 1 Pick. 528, note; 8 U. S. Dig. § 114, p. 619.

4. A trustee cannot discharge himself from liability; this can only be done by some provision in the deed, by decree of the Court of Chancery, by full execution of the trust, or by the consent of all the parties interested.—Barnwell v. Barnwell, 2 Hill's Ch. 232; 11 Paige 314; 8 U. S. Dig. § 101, p. 360.

5. An executor cannot take land in payment of debts due to the testator; if he does, his purchases are his own, and he is chargeable with the sum allowed for the lands.—Weir v. Tate, 4 Ired. Eq. R. 264.

6. As to the gin: Thompson proves that McKenzie sent it to his father's to be repaired, and that it was taken away by Bilk after his father's death; and Bilk is proved to have been solvent.

7. The solvency of Caxton, who had a lease of the land for two years, is shown by several witnesses; and it is also proved that Royall had issue by his wife.

8, 9 and 10. The Billings' debt is established by his own testimony; the Montgomery debt by the evidence of Chilton; and the Price debt by that of several witnesses.

11. As to compensation: McKenzie claimed, in his answer to the bill filed in Talladega, that the McIntyre & Co. debt was a charge on the fund; that the debts of Weed, and Benedict, and Robbins, were a charge to the full amount. The first was paid him by Royall from another fund; and the last was bought up by him at 62½ cents in the dollar. He insisted then that he owed nothing; while his own note for $3929, with interest, was a fund in his hands; and he had paid only about $500 or $600 for the debts of Weed, Benedict and Robbins; these were all he settled, while he has had the fund since 1832. He proved no expense or trouble, and under the circumstances, the allowance made him was liberal.

12. The calculations on McKenzie's note, as made by the

master, were correct.—Childress v. Childress, 3 Ala. 750; Duffee v. Buchanan, 8 *ib.* 27; Purdom v. Tipton, 9 *ib.* 914; 2 Hill 408; 3 Rich. 125.

J. E. BELSER and SEABORN WILLIAMS, *contra*:

1. McKenzie should be allowed his commissions.—Gould v. Hays, 19 Ala. 438; Powell v. Powell, 10 *ib.* 900; Elliott v. Elliott, 6 G. & John. 35.

2. He should only be charged with his own note as money, and interest should not be compounded against him.—Childress v. Childress, 3 Ala. 754; Duffee v. Buchanan, 8 *ib.* 31; Purdom v. Tipton, 9 *ib.* 914; Peyton v. Smith, 2 Dev. & Bat. Eq. 339; Myers v. Myers, 1 Bailey's Eq. 23.

3. The charging of McKenzie with interest on the other available funds raised from the assignment after the end of two years, was but reasonable. No arbitrary rule can be laid down in such cases.—Graham v. Davidson, 2 Dev. & Bat. Eq. 156; Rice's Eq. 433.

4. McKenzie should not have been charged with the Price debt, nor on account of the Montgomery debt, as he acted in good faith.—Douthit v. Douthit, 1 Ala. 597; Duffee v. Buchanan, 8 *ib.* 31; Willis v. Willis, 16 *ib.* 652; Harrison v. Mock, 10 *ib.* 185.

5. Howard is a competent witness for McKenzie, not being interested so far as his co-trustee is concerned.

6. It should be observed that this is not a creditor's bill, but a bill filed by the assignor's administrator; that the assignor lived long after the assignment was made, and acquiesced in the delay as to the winding up of the assignment; that the assignor was silent until the filing of the bill in 1841.

7. The answer of McKenzie is evidence; the bill is a searching one in every particular, and the answer is responsive.—Powell v. Powell, 7 Ala. 582.

8. The trade for the Price land is void; Price, who owed the debt, and traded for the land, is insolvent. The land either belongs to the estate, or the debt is lost.

GOLDTHWAITE, J.—The first question presented by the assignment of errors is, as to the allowance of interest made by the master upon the available debts specified in the

assignment. No principle is better settled, than that it is the duty of a trustee of a *chose in action*, to take every necessary step, compatible with reasonable diligence, to meet the object of the trust (Caffrey v. Darby, 6 Ves. 488; Mucklow v. Fuller, Jac. 198; Powell v. Evans, 5 Ves. 839; Tebbs v. Carpenter, 1 Mad. 290; Lewis v. Copeland, 6 Beav. 486); and it is not sufficient for the trustee merely to apply for payment, but it is his duty to bring an action, if necessary, for the recovery of the amount.—Lawson v. Copeland, 2 Bro. C. C. 156. With the exception of the notes on McKenzie, Price, Hugh Montgomery, Thomas J. Wright, and some few others, the claims assigned were under fifty dollars, and, indeed, by far the greater portion of them under twenty dollars; and as the answer of McKenzie admits, that the debtors generally were residents of the district in which he resided, we think that by the exercise of ordinary diligence on his part, most of the available debts could have been realized within a year after the acceptance of the trust. There would, undoubtedly, be cases in which this result could not be accomplished; but in the absence of any special cause, we see no good reason for allowing a longer period to collect from debtors who were solvent, and whose debts were due at the execution of the assignment, or on the first of January thereafter, as the accounts generally were.

The assignment requires the trustees to apply the proceeds of the claims, &c., assigned, to the payment of the debts of Royall, in equal proportions; but the record shows, that every creditor of Royall, whose debts, so far as we can learn, were a charge upon the trust fund, accepted the provisions of the assignment shortly after its execution; so that there was no necessity for McKenzie to retain the moneys in his hands, in order to ascertain these debts, after the expiration of the year. These debts were bearing interest; and it was not only the duty of the trustee, to proceed to collect, with all convenient diligence, the claims assigned, but to apply the funds collected to the payment of the creditors, in order to stop interest. There can be no definite rule to govern courts as to the charge of interest against trustees, but we think under all the circumstances of this case, equity requires that interest should be charged on the available assets from

the time we have stated—twelve months after the acceptance of the trust, with the exception of the notes on McKenzie. Under our own adjudications, where notes are due by trustees, the amount should be charged as cash in their hands from the time they are due (Childress v. Childress, 3 Ala. 750; Duffee v. Buchanan, 8 Ala, 27). As the demands to which the trust funds were to be applied were ascertained when the first note fell due, it was the duty of the trustee to apply such funds to the purpose of the trust; and failing to do so, he is properly chargeable with interest.

We think, also, the account should have been made up to the 30th of July, 1844, the balance then struck, and that the complainant would be entitled to interest on such balance, if any was found in his favor. It was, as we have seen, the duty of the trustees, to have collected and applied the available assets to the payment of the trust debts within a reasonable time, and after the discharge of these debts, to have paid the surplus, if any, to Royall. This, however, was not done. More than twelve years had elapsed since the defendants had taken upon themselves the execution of the trust; and on the application of the *cestui que trust*, so far as the surplus was concerned, in July, 1844, an account was taken. It is true that Royall agreed, on McKenzie's confessing judgment in favor of certain of the creditors, that the balance should stand over for future adjustment; but this agreement does not affect the principle upon which the *cestuis que trust* were entitled to interest. The time which had elapsed was sufficient, and more than sufficient, to have closed the assignment so far as the creditors were concerned; and after satisfying their demands, and allowing a reasonable time to ascertain the state of accounts, the party entitled to the surplus, upon making application, was entitled to interest from the time of taking that account.

As to the Price debt: There is a good deal of conflict in the testimony as to the solvency of the debtor; but we think the evidence establishes the fact, that he had, at the time of the acceptance of the trust by McKenzie, property fully sufficient to pay the debt. It is clearly proved, that this property was transferred to his father, Josiah Price; and one witness, the brother of the debtor, swears that the father was

to pay this debt. It is difficult to resist the conclusion, that such was actually the case, as we find the father afterwards offering to pay the debt, in the land which McKenzie subsequently received. If the transfer was not made upon this consideration, it is evident that the sale was fraudulent and void, and that the property of Price, which was amply sufficient to discharge this debt, could have been subjected to its payment. The law requires, as we have already seen, that in such case the trustees should take every necessary step, by action or otherwise, to realize the debt; and if the fund be lost from their neglect of this duty, they will be held personally responsible to the *cestuis que trust* for the loss, although they may have acted without any improper motive.—Caffrey v. Darby, *supra*. The answer of McKenzie alleges, that Royall, who was absent at the time the land was taken in discharge of the debt, on his return, was advised of the arrangement, and was perfectly satisfied with it; and had this allegation been sustained by the evidence, there would be no question that the complainant, as the representative of Royall, could not charge McKenzie with the debt. But these facts are not established, and the answer is not proof; such circumstances being matter in avoidance, which requires evidence *aliunde* to sustain it.—Randall v. Phillips, 3 Mason 378; Cannon v. Norton, 14 Verm. 85; Clarke v. White, 12 Pet. 178. It is also shown, that McKenzie not only settled this claim by taking land, but that he took the title to himself individually. It is true that this also is attempted to be explained by the answer, which states that the title was thus taken in order to convey to purchasers the more easily; but there is no evidence on this point, and we do not see how a title could be made more easily by the grantor as an individual, than by the same person in his fiduciary capacity. Whenever a trustee treats the trust property as his own, he is held responsible for the consequences.—Wren v. Kinton, 11 Ves. 377; Massey v. Banner, 4 Madd. 413; McDonnell v. Harding, 7 Sim. 178. This rule is a most salutary one, and the interest of the *cestuis que trust* demands that it should not be relaxed. It would be unsafe to hold that a trustee could, without the sanction of all the parties interested, settle the trust debts, by receiving land,—take the conveyance to himself individually,

and, if the property should turn out to be valueless, let the loss fall upon the *cestuis que trust.* The trustee should understand, that if he will deal with the trust property as if it were his own, a Court of Chancery will so regard it, if the *cestui que trust* elects to do so.

We do not think, however, that McKenzie should be charged with more than the amount of this debt, as it was proved by Isaac D. Price, at the time of its settlement, $1,239 15, and interest upon the same from a year after the acceptance of the trust. We do not understand the answer of McKenzie to admit the amount of the debts assigned as specified in the deed of trust, so as to estop him from showing the real amount of the debt, which was all that in equity he could be required to collect or account for.

As to the claim on Hugh Montgomery for one hundred and ninety-eight dollars: We think that McKenzie should be charged with the whole amount of this debt, with interest from the same period as the other debts, except the notes of McKenzie. The evidence of the witness Chilton is conclusive to show that this debt was collected; the deed confers no authority upon the trustees to compromise the debts specified in the assignment; and having done so without the consent of the *cestuis que trust*, the trustees must be charged with it. The evidence shows, that three hundred dollars on this claim was collected; but it is not very clear as to the time when the collection was made. There is no evidence that McKenzie acted otherwise than in good faith; and as the debtor had left the State in which the debt was contracted, we do not think he should be charged with more than the amount of the debt, and interest from the time we have stated; and he would be entitled to a credit of five per cent. commissions on the amount, which it would have cost him to make the collection.

As to the Billings debt: The evidence shows that he was a good blacksmith, and although several witnesses swear as to his solvency, a greater number depose as to his insolvency. His own testimony has been taken, which is entitled to full credit, as the defendant's witnesses speak of him as an honest man; and he proves that he was in the employment of McKenzie, the year that the latter left South Carolina,—that

they had a settlement, and that McKenzie fell in his debt about twenty dollars, which he paid him in cash; that the account of the settlement was made out by McKenzie, and has been lost or destroyed; that he cannot say positively whether the debt assigned was included in the settlement or not. Taking into consideration the facts thus proved,—bearing in mind, also, that McKenzie is proved to have been a good collector, and that it was his duty to collect this demand,—it would be against every reasonable presumption to suppose that upon this settlement, the items of which were made out by McKenzie himself, this debt was not included, and that if it had not been, McKenzie would not have retained the amount which he paid to the debtor on that settlement, as a payment *pro tanto*.

So, also, in relation to the claim on Wilkes Caxton for the lease of the plantation. We understand the answer of McKenzie to admit the lease; but he insists that the amount of the same was not realized by him, for the reason that the lands belonged to the wife of Royall; that she was dead when the lease was made; that her children by a former marriage were the owners on her death; that they took possession of the land, and the lessee, Caxton, refused to pay the rent. The allegations of the answer are not very precise as to the tenancy of the wife, but we can give them no other construction, than that the wife was the absolute owner, or tenant in fee; and as the witness Crockett proves that Royall had issue by this wife, that would make him tenant by courtesy, and give him a life estate. But independently of this view, the facts set up by McKenzie could not avail him, if they would have amounted in law to a full defence against the payment of the rent by the lessee, for the reason that the solvency of Caxton is fully proved, and the lease being admitted, the other facts to which we have referred are new matters, and it devolves upon the defendant to prove them by other testimony than the answer. The chancellor erred, therefore, in sustaining the exception to this claim.

As to the gin: The answer of McKenzie denies that he ever received it; but the schedule attached to his answer shows that it was among the articles assigned, and it is evident that McKenzie knew where it was, as we find him sub-

sequently asserting title to it, and offering to sell it to the witness Coulgan for seventy-five dollars. The witness Thompson proves, that it was left with his father to be repaired; that it was worth fifty dollars, and that it was taken away by Darling Bilk, whose solvency was fully established by the testimony. If Bilk took the gin without the authority of McKenzie, it was the duty of the latter to have held him or Thompson responsible, and failing to do so, he is responsible himself. There was no error to which the defendants could object in the charge made by the master for this item.

The claim of Shelton we regard as a proper charge on the trust fund. This debt was included as one to be paid out of the proceeds of the assignment; and the slight discrepancy in the amount of the debt as furnished by Royall, and as stated by the creditor, makes no difference. The only question is, whether this was a trust debt, and upon that we can have no doubt. The debt is due by McKenzie, and he is responsible for it to the creditor.

In sustaining the 8th exception of the defendants to the report of the master, we think the chancellor erred. The order of reference directed an account to be taken of the expenses of executing the trust, and also that the master should ascertain what would be a reasonable compensation to the trustees, should the chancellor deem compensation proper.—The report is, that five per cent. upon the amount reported by the master as available from the assets, except the notes on McKenzie, would be a fair compensation; and this portion of the report is excepted to, on the ground that it was not authorized by the decree of reference. We are unable to perceive any force in this objection. The available assets were ascertained, and the compensation reported was a certain commission upon the amount of a specific portion of these assets. We see nothing to have authorized the allowance of the exception.

The only remaining question arising out of the assignment of errors on the part of the complainant, is as to the action of the chancellor in overruling the exceptions taken to the testimony of the witness Howard. The rule is, that a defendant trustee may be a witness for his co-trustee, unless he has some personal interest in the event of the suit; but

where there is some charge which he is interested in rebutting, or any liability, however trivial, which depends on the nature of the decree in the suit, his evidence will not be received.—Frank v. Mainwaring, 2 Beav. 126. Here the witness was the co-trustee; the bill seeks an account of him as such, and the only answer he gives is, in substance, that he accepted the trust upon an understanding with Royall that he was not to discharge any of its duties. This allegation is not sustained by the proof; and the rule is, that if one trustee, after accepting the trust, voluntarily permits his co-trustee to take the management of the trust, and the possession and control of the trust property, both are answerable.—Morell v. Morell, 5 John. Ch. 283. This is precisely the case here, and he for that reason was incompetent to prove the insolvency of the debtors in the deed; for no decree could be rendered against him for debts in that condition.

As to the cross errors assigned by McKenzie: The exception to the answer of McKenzie to the bill filed in Talladega, was properly overruled, as his admissions contained therein, in relation to any items or portions of the assignment which is the foundation of the present suit, were evidence against him. It makes no difference whether the parties are the same or not: it is received as a confession.—3 C. & H. notes to Phil. Ev. 926, and cases there cited.

The exception taken to the evidence of the witness Humphreys was not sustainable. This witness, it is true, states that "he regards certain debtors," named in the assignment, "as insolvent"; but it is evident, from the other portions of his testimony, that his conclusion is based upon his knowledge of their circumstances. Not so, however, in relation to the witness Buskins, to whose evidence the same objection was made. His testimony, in relation to this fact, is mere opinion, and the exception taken to his evidence should have been sustained.

The second exception taken by the defendants to the report of the master, was also properly overruled, by reason of its generality. That portion of the report of the master to which this exception was directed, involved an examination into the availability of upwards of a hundred and sixty different and specific claims, and the examination of a most vo-

luminous mass of evidence in relation to the solvency of the different debtors. This part of the report specified each claim which was found to be available; and instead of directing the exception to those debts as to which the decision of the master was supposed to be incorrect, it is levelled at the whole in mass,—thus throwing upon the chancellor the entire duty which he rightly devolved upon the master. If the order of reference had simply directed the ascertainment of the available debts, and upon the report coming in, an exception had been made in general terms to the report, specifying no particular debt, alleging no specific ground, it would be objectionable. It is the office of the exception, where the report embraces separate and distinct items or matters, to point to the particular one objected to; and as this was not done, the action of the chancellor in overruling it, was free from error.

The only remaining question, is the one presented by the cross assignment of errors involving the correctness of that portion of the report of the master which was in relation to the notes due Weed & Benedict, and E. C. Robbins, which were to be paid out of the proceeds of the assignment. The trust deed was made in the fall of 1832; and in December, 1835, more than three years afterwards, and when McKenzie must be presumed to know the amount that would be realized, he buys these notes at about fifty cents on the dollar, and in payment gives his own individual note, due one year after date, for the amount he agreed to pay them; and it is under these circumstances that he claims a credit for the whole amount of the debts he thus purchased. Equity scrutinizes with a jealous eye every species of dealing by a trustee made in his individual character, having any connection with the trusts which he has undertaken to execute, and it does not allow him to deal with them for his own personal profit.—This is a most salutary rule, and the slightest relaxation of it would tend to bring the strongest passion of our nature—self-interest—in conflict with the faithful discharge of confidential duties. The report of the master, crediting the trustee with only the actual amount he had paid, was correct. *In re* Oakley, 2 Eden, 478.

The decree of the chancellor must be reversed, and the

cause remanded, to be proceeded with in conformity with the views we have expressed, the defendants in error paying the costs of this court.

CHILTON, C. J., did not sit in the case, having been of counsel.

HUDSON *vs.* YOUNG.

1. In an action on a detinue bond, a recovery may be had (under a special allegation) for the value of the hire of the property during the whole time the defendant was deprived of its use, although, after he had failed to give the statutory bond, the property was delivered to the plaintiff upon his execution of a second bond for its forthcoming, as provided by the statute; and this value may be proved by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession."

APPEAL from the Circuit Court of Benton.

Tried before the Hon. ANDREW B. MOORE.

COVENANT by William Young against Samuel P. Hudson on a detinue bond, which the defendant had signed as surety of Joshua B. Wickham, who was the plaintiff in the detinue suit. It appears that the defendant in that suit failed to give the statutory bond for the forthcoming of the property, and thereupon, after the expiration of five days, the plaintiff gave another bond, as required by the statute, and the property was delivered to him by the sheriff. The declaration alleges that the said writ in detinue was wrongfully sued out, and the plaintiff therein failed in his suit; that judgment was rendered in said suit, on the verdict of a jury, in favor of the defendant therein; "that by the wrongful suing out of said writ, plaintiff was deprived of the use of said property for more than three years, and that said property was injured and damaged while in the possession of defendant; and that, by reason of said deprivation, plaintiff was confused and injured in his business,

and by reason of the injuring and damaging of his said property, and the taking of the same out of his possession, as aforesaid, he was entirely deprived of the use of the same, and also of the profits and advantages which might, and otherwise would, have accrued to him from the use and labor of said property, and was put to great expense and trouble in defending said suit, and recovering said property," &c.

The defendant demurred to the declaration, and his demurrer was sustained "as to the breaches alleging injury to the property of the defendant, and to the breach alleging injury and confusion to him in his business," and overruled as to the remainder; and he then pleaded, in short by consent, 1st, performance of his covenants; 2d, that the property mentioned in the declaration did not belong to plaintiff,—that he gained said detinue suit by showing an outstanding title in a third person, and that the said property was not in his possession at the commencement of said detinue suit; 3d, *non infregit conventiones;* and, 4th, that plaintiff has sustained no injury.

On the trial, after proving the execution of the bond sued on, the plaintiff "proved that said property was, by virtue of said writ and the order of the clerk thereon endorsed, taken by the sheriff of Benton county out of plaintiff's possession, and that said detinue suit was determined in his favor before the commencement of this action; and he then offered to prove that said property, so taken out of his possession, was kept from him for more than two years. The defendant objected to proof that said property was kept out of said plaintiff's possession for more than ten days, and the court sustained the objection. The plaintiff then proved that said property was kept out of his possession by the sheriff, under said order, for ten days, and the value of the use of the property per day, over and above expenses, for said ten days. The defendant objected to this proof of value; but the court overruled the objection, and the defendant excepted."

The plaintiff then, "for the purpose of laying a predicate for the introduction of proof of the further disposition of said property," proved the execution of another bond by the said Wickham and Hudson, for the forthcoming of the property in said detinue suit, under which the sheriff delivered

said property to said Wickham, and then offered said bond in evidence. The defendant objected to the reading of this bond in evidence; but his objection was overruled, and he excepted. The plaintiff then offered evidence tending to show that he had been kept out of the possession of said property during the pendency of said detinue suit, for two years and more; and also offered to prove the value of the use of said property per day, over and above expenses, during that time. The defendant objected to the evidence offered of the value per day for more than ten days; but the court overruled the objection, and allowed the evidence to go to the jury "as one means of ascertaining the injury to plaintiff," and the defendant excepted.

The defendant requested the court to charge the jury, that they could only give damages, in this action, for the detention of the property ten days from the time it was taken out of plaintiff's possession by virtue of said writ in detinue; which charge the court refused, and the defendant excepted.

All the above stated rulings of the court, adverse to the defendant below, are now assigned for error.

JOHN T. MORGAN, for the appellant:

1. Under the state of the pleadings, to which the proof offered was applicable, the plaintiff could only recover such damages as were applicable to the first bond, and such damages as were the direct legal effect of the breach of the condition of that bond, the condition of which was confined to the damages growing out of the suing out of the writ of detinue.—Vicars v. Wilcox, 4 East's Rep. 295; 6 Hill 522; Donnell v. Jones, 13 Ala. 508; 2 Greenl. Ev., p. 210, § 256.

2. The replevy bond (or, as it is called, the second bond) expressly covers the case of the loss or destruction of the property, because it provides for the delivery of it after the determination of the suit; and for the loss of property embraced in the bond, an action must be had on that bond, and not on the bond of indemnity.—Falls v. Weisinger, 11 Ala. 801; Burgess v. Sugg, 2 S. & P. 318; Givhan v. Dailey's Adm'r, 4 Ala. 336.

3. The rents, or hire, of the property, in the hands of the bailee, did not accrue directly in consequence of the issue of

the writ, but of the giving of the replevy bond, and of defendant's failure to give such a bond. The surety on the replevy bond is not responsible for the wrongful suing out of the writ in detinue; and, *e converso*, the surety on the indemnity bond could not be liable for damages growing out of the execution of a different bond by different persons. If the property had died, pending the detinue suit, without the plaintiff's fault, no one would have been liable for it; if it had died in consequence of his fault, the surety on the replevy bond (if any person) would have been liable for it. The true action here would be, an action on the case, or an action of *assumpsit*, for the injury which the party may have sustained from the subsequent and distinct act of giving a different bond.

WHITE & PARSONS, *contra*:

The breach in the declaration, as to which the demurrer was overruled, was for the loss sustained by plaintiff in being deprived of his property and the use of it. The bond was conditioned to pay "all costs and damages sustained" by Young from the wrongful suing out of the writ. The verdict in favor of the plaintiff, in the case of Wickham v. Young, was evidence of the wrongful suing out of the writ, for the action was detinue, and necessarily involved the right to the property.—Zeigler & Hall v. David, 23 Ala. 140-41. The loss of the use of his property was the direct consequence of the suit against plaintiff. The property was taken under legal process, and was detained by lawful authority, and delivered by the sheriff, under the direction of the law, to the appellant; and all this was the legitimate result of the first wrongful act of Wickham—the institution of suit against Young. Such damages are recoverable upon the bond.—Donnell v. Jones, 13 Ala. 508; Kirksey v. Jones, 7 *ib.* 622; McCulloch v. Walton, 11 *ib.* 492; Zeigler & Hall v. David, *supra*; Bettis v. Taylor, 8 Por. 564; Alexander v. Hutchinson, 9 Ala. 825.

The injury to the plaintiff (Young) from the detention of his property ten days under the order of the clerk, upon the process sued out by Wickham, was no more the consequence of the suing out of the original action, than was the delivery of the property to the plaintiff after the defendant had failed to give bond, and upon the plaintiff's giving bond, as provided

by the statute. This result would not have followed, it is true, if defendant had replevied the property, nor if the plaintiff had failed to give the second bond; but each of these is based upon, and emanates from the original process, and is just as much the proximate consequence of the suit by Wickham against Young, as would be the levy and sale under an attachment or execution. The right of the plaintiff, and of the sheriff as his legal agent, to take the property at all, depended on the plaintiff's right to sue; and when it is ascertained that he had no right to sue, both he and the sheriff become *quasi* trespassers.

The evidence of the value per day of the use of the wagon and team was only offered as one mode of ascertaining the damages. If Hudson wished to avoid the effect of this rule of damages, as being too stringent, he should have offered other proof of value; as, indeed, it is manifest he did, for this rule would have given damages treble the amount of the judgment rendered.

CHILTON, C. J.—The declaration avers, that in consequence of the suing out of the writ of detinue, and the seizure of the property sued for, plaintiff was deprived of the use of said property for a long space of time, &c.; and the court allowed proof to be made of the value of the use of said property per day, over and above the expenses, during the time it was in the possession of Wickham, the plaintiff in the detinue suit.

This was rather a circuitous mode of proving the value of the hire of the property for the time Young was deprived of it, but we are not prepared to say that it was objectionable. The ground of objection taken in the court below is, that the plaintiff was permitted to recover for more than five days' detention, that being the period within which he could have given bond for the forthcoming of the property to abide the result of the suit; and it is insisted that his failure to give bond, and the execution of such bond by the plaintiff in the detinue suit, in consequence of which the property was delivered over to the latter, makes the subsequent detention of it by the latter but a remote consequence of the suing out of the original process, and that the damage resulting from such deprivation of the use cannot be recovered in an action upon

this bond, not being the necessary result of the issue of the writ of detinue.

Damages are of two kinds:—*general*, that is, such as *necessarily* result from the injury complained of, being such as may be shown under the *ad damnum*, or general averment of damage at the end of the declaration, and of which the defendant is presumed to be cognizant and to come prepared to meet; and *special*, that is, such as are the *natural* and *proximate* consequences of the injury alleged, but which are not the *necessary* result of it. Such damages the law does not imply, neither does it presume the defendant to be cognizant of them; hence, to enable him to come prepared to defend against them, the plaintiff must particularly specify them in his declaration, or he will be permitted to give no evidence at the trial concerning them.—2 Greenl. Ev. § 224, 3d ed.

In the case before us, the damage caused by the *seizure* of the property sued for was the proximate, but not the necessary result of the suit. The sheriff was commanded to seize it, and take it into his possession, unless the defendant should give bond. It was in the power of the defendant to have retained it, by stipulating for its forthcoming with security; yet he was not bound to do this, but might remain passive, leaving the complainant to the natural consequences of his own wrongful act, one of which is the deprivation of the use of the property as respects the defendant. The execution of the second bond by the plaintiff in detinue was but the means of obtaining possession of it himself, and furnished security for the return of the *corpus* in a certain event; but the question of damages for the deprivation of the use of it in the meantime, by the defendant, Young, is neither provided for, nor in anywise affected by this bond. Such damage is covered by the first bond, or is wholly unprovided for by the statute. We have seen it is the natural, though not the necessary result of suing out the writ with the order of seizure endorsed; and as it is specially averred in the declaration, we entertain no doubt of the correctness of the ruling of the primary court in allowing it.—Zeigler *et al.* v. David, 23 Ala. 127. There are cases, where the plaintiff is not permitted to recover damages which he allows to accrue by his obstinacy and tortious neglect; as if A leaves open the gate of B, and B, with a knowl-

edge of the fact, passes it frequently, and refuses to close it, and cattle walk through afterwards and commit depredations upon the crop; here the damage is rather to be regarded the result of B's obstinacy and neglect, than of the original wrong in leaving the gate open by A. So, when the trespass complained of was the removing of a few rods of fence, it was held, that the proper measure of damages was the cost of repairing it, and not the injury to the subsequent year's crop, arising from the defect in the fence; it appearing that such defect was known to the plaintiff.—Locker v. Damon, 17 Pick. 284. In this case, according to the facts, the defendant not only wrongfully caused the property to be taken from Young's possession, but, following up and consummating the injury, he availed himself of the practice of the court to retain it in his own hands. Such damage naturally results from, and is a proximate consequence of the suit, and properly forms the ground of recovery.

Judgment affirmed.

RIVES, Adm'r, *vs.* BAPTISTE.

1. Where the payment of money, secured by a penal bond, is made to depend on the performance of a condition precedent, an action cannot be maintained on the bond until the condition has been fully performed.
2. The doctrine in relation to partial performance of mutual covenants which go to a part only of the consideration on both sides, where the part unperformed can be compensated in damages, (Boone v. Eyre, 1 H. Bla. 273, n. a,) has no application to the case of a penal bond for the payment of money on the performance of a condition precedent.
3. Although the courts will not require the performance of every minute particular of a condition, unless its full and exact performance is part of the essence of the contract; yet, where the execution of a trust deed is a condition precedent to the payment of money secured by a penal bond, the obligor has a right to insist upon a complete execution of the trust before he can be held liable on his bond.

Appeal from the City Court of Mobile.

Tried before the Hon. Alex. McKinstry.

THIS was an action of debt on a penal bond, brought by the appellant, as administrator of the estate of George M. Rives, deceased, against Jacob Baptiste. The condition of the bond is as follows: "Whereas I, the said Baptiste, George M. Rives, deceased, T. L. Toulmin, and John K. Collins, became the sureties of William Magee as receiver in a suit in chancery, in which the trustees of the Bank of the United States of Pennsylvania were plaintiffs, and the heirs and representatives of Henry Hitchcock were defendants; and said Magee has made default as such receiver, and the said William H. Rives, as administrator of said George M. Rives, has paid on account of such default the sum of $32,722 54, and, with a view to secure the same from said Magee, has taken his notes, with a mortgage on his personal and real estate, due as follows: the first, for the sum of $5,671, due the first of September, 1846, with interest from date, dated the first of September, 1845; the second, for the same amount, dated the same time, with interest from date, and due the first of September, 1847; the third, for the same amount, dated the same time, with interest from date, due Sept. 1848; the fourth, for the same amount, dated the same time, with interest from date, due Sept. 1849; the fifth, for the same amount, due at the same time, with interest from date; the sixth, for the same amount, due at the same time, with interest from date: Now, in the event that said Magee shall fail to pay said notes, and the mortgage property prove insufficient to pay the same, and said Magee unable to do so, and said Rives unable to collect said notes of said Magee by law; then, should I, the said Jacob Baptiste, pay to said Rives, administrator as aforesaid, one-fourth of the ultimate amount or loss he may sustain by reason of his paying up the default as aforesaid, then this bond to be void," &c.

The defendant craved oyer of the bond and condition, and pleaded, 1st, performance; 2d, that plaintiff had not exhausted the property conveyed by said Magee in mortgage, according to the terms and stipulations of the said bond, before the commencement of this suit; and, 3d, that said Magee has not been sued on said notes, and plaintiff has not ascertained that the same could not be collected by law, according to the stipulations of said bond.

The plaintiff replied as follows: "That said William

Magee, with his wife Mary, on the — day of September, 1845, at Mobile, made and delivered to said plaintiff their deed of mortgage, with power of sale, whereby said Magee and wife conveyed to said plaintiff certain real and personal property, in said deed described, to secure the payment of the said several sums of money mentioned in said writing obligatory; that it was stipulated in said deed of mortgage, that if either of said notes should remain due for the space of ninety days after the maturity thereof, then, and in that case, each and all of said notes should forthwith be due and payable, notwithstanding some of them shall have a longer time to run before maturity upon their face, and the said plaintiff could forthwith commence suit, at law or in chancery, for the recovery of the whole or entire debt covered by said six promissory notes; and it was further stipulated, that in the event said Magee should fail to pay any one of said notes for the space of ninety days from its maturity, or any part thereof, then said plaintiff might take possession of said real and personal estate, and expose the whole to sale at public auction, at the court-house in the city of Mobile, or on the premises, first giving twenty days' notice in some newspaper printed in Mobile, and from the proceeds of such sale, after paying the expenses thereof, the said plaintiff should pay himself all of said debt, and interest, and charges incident to closing the said business, and the residue, if any, should pay to said Magee or his successors; and the plaintiff avers, that the first of said notes became due on the first of September, 1846, and remained due and payable for the space of ninety days after the maturity thereof; and plaintiff avers that, in pursuance of the terms of said deed of mortgage, he proceeded to take possession of said property embraced in said deed, and sold the same according to the tenor of said deed, on the 18th day of January, 1847, and after paying the expenses of said sale, he received the sum of $11,221 18, to be applied to the payment of the aggregate sums of money mentioned in said notes; and plaintiff further avers, that on the — day of —— he commenced his suit against said Magee to recover the aggregate amount of all said notes of said Magee, as he was authorized to do under the terms and stipulations contained in said deed of mortgage, in the Circuit Court of Mobile, and at the Spring term, 1848,

of said court, on the 24th day of May, 1848, being a day of said term, he obtained judgment against said Magee for the sum of $40,245 98, besides costs; and plaintiff further avers, that an execution was regularly issued on said judgment against said Magee, which was returned before the commencement of this suit 'no property found' out of which to make the same, in due course of law; and said plaintiff further avers, that all of said sums of money mentioned in said notes and deed of mortgage, and in said writing obligatory, have not been paid by said Magee, nor by said defendant, nor any part thereof, other than the said sum of money arising from said sale as aforesaid; all of which said plaintiff is ready to verify," &c.

By special leave of the court, the plaintiff also filed a second replication, in which he avers "that he, as the administrator of George M. Rives, deceased, and said defendant, together with T. L. Toulmin and John K. Collins, were bound as sureties for William Magee as receiver, as set forth in the condition of said writing obligatory, and being so bound, he did, on the — day of September, 1845, pay up the default made by said Magee, to-wit, the sum specified in the condition of said writing obligatory, in consideration of the execution and delivery to him of the deed of trust described in the first replication, the notes therein mentioned, and the said writing obligatory executed by said defendant; that the said deed of trust, and the notes therein described, and also the said writing obligatory, were all delivered to said plaintiff at the same time, to-wit, on the first day of September, 1845, and upon the delivery thereof, the said *delivery* (?) paid the default aforesaid, to-wit, the sum of $32,722 54; and the said plaintiff further avers, that said Magee made default in the payment of the first note specified in said deed of trust, and the same remained unpaid for more than ninety days, wherefore the said plaintiff advertised the whole of said property, both real and personal, for sale, according to the conditions and terms of said deed of trust, and on the — day of January, 1847, he did, at public auction at the court-house in Mobile, sell all the property, both real and personal, described in said deed of trust, except five slaves, three of which five had died before the day of sale, and whilst they were in the possession of said

Magee, and the two others (one of the value of $1,000, and one of the value of $600) after the sale were carried by said Magee to New Orleans, and there sold by him; and said plaintiff further avers, that the sum produced by the sale of all the property sold at the court-house in Mobile, added to the value of the said two slaves sold by Magee in New Orleans, amounted only to the sum of $12,831 18, which said sum has been applied towards the payment of said debt secured by said deed of trust, but there still remained a large balance due, to-wit, the sum of $25,000; and said plaintiff further avers, that by reason of the default in the payment of the said first note, described in said deed of trust, the entire debt secured by all of said notes described in said deed of trust became due; and further the said plaintiff says, that he afterwards commenced suit against said William Magee, in the Circuit Court of Mobile, to recover said balance, and at the Spring term of said court, A. D. 1848, he recovered a judgment against said Magee, for said balance, amounting to the sum of $41,245 98, upon which said judgment execution has been issued, and returned 'no property found,' by the sheriff of Mobile county; and said plaintiff further avers, that he is, and always has been, unable to collect said balance from said Magee by law, he being insolvent; and plaintiff further avers, that by reason of the premises aforesaid the condition of said writing obligatory has become broken, and the said defendant liable to pay said plaintiff the one-fourth part of said balance remaining unpaid after the application of all the money realized from the sale of all the property described in said deed of trust in manner aforesaid, which said one-fourth part amounts in the aggregate to the sum of $10,311 44; yet said defendant has not paid the same, nor any part thereof, though often requested, and this the plaintiff is ready to verify," &c.

The defendant took issue on the first replication, and demurred to the second, assigning as causes of demurrer: "1. It does not appear by the same but that Rives had the two slaves, mentioned therein as sold in New Orleans, in his possession at the time of the public sale, and could have executed his trust as to them in the manner prescribed, and does not show any excuse for not having executed his trust. 2. Because no

reason is assigned for permitting Magee to take said slaves to New Orleans, or for selling them there. 3. Because the plaintiff shows no excuse for not executing his trust, and no execution thereof, but shows a wilful default in this regard."

The court sustained the demurrer to the second replication, and on the issue joined on the first a verdict and judgment were rendered for the defendant. The sustaining of the demurrer to the second replication is now assigned for error.

E. S. DARGAN, for the appellant:

It may be admitted that the sale of the property of Magee, conveyed by the deed of trust, was a condition precedent to plaintiff's right to sue on the bond; yet this admission will not exempt the defendant from liability, under the facts disclosed by the record. The defendant received the entire consideration, which was the payment by Rives of the entire debt for which they were both jointly bound. The first condition precedent to plaintiff's right to sue—that he must sue Magee to insolvency—has been strictly performed; and the second—that he must sell all the property conveyed by the deed, and apply the proceeds to the debt for which they were jointly bound—has been performed in part, and the part unperformed is susceptible of complete compensation: all the negroes save two have been sold, and the value of those two could be (and was) definitely ascertained, and Rives charged with the amount. The rule established by all the authorities bearing on the case, is, that if the condition precedent is susceptible of division, and may be performed in part, and the part unperformed be capable of complete compensation, and the defendant has received the consideration of the covenant, he shall be held upon the covenants, to the extent, at least, of the part performed.—Boone v. Eyre, 1 H. Bla. 273, n. a; 1 Saund. R. 320, note; 10 East 295; 3 Watts 330; Hill v. Bishop, 2 Ala. 320.

But, independently of this view, the condition has been substantially performed, and this is sufficient. The substance of the condition must always be looked to, in determining whether it has been performed:—for instance, if the condition be to enfeoff A, and the land is conveyed by way of lease and release, this is sufficient; for the substance of the condi-

tion is, that A shall obtain the title, and so that he gets the title, although the mode and means of performance are different from that pointed out in the covenant, the condition is performed. So, where the intent to be gathered from the contract is the substantial performance of an act, although the mode or means be pointed out, the party may recover upon a substantial performance of the act, otherwise than in the mode prescribed, leaving the other party to recoup his damages, if the departure from the mode prescribed is prejudicial to him.—Addison on Contracts, pp. 186 to 190. Indeed, to make the manner of performance of the substance of the condition, it must clearly appear that such was the intention of the parties. But, if we consider the nature of this contract, and the circumstances attending it, in connection with the language, the intention of the parties must have been the appropriation of the trust property to the debt, while the sale at the court-house was but the mode pointed out by which the substance of the condition was to be performed.—3 Met. 255; Chambers v. Jaynes, 4 Barr 39.

R. H. SMITH, *contra*:

The demurrer to the second replication was rightly sustained. The stipulations in the trust deed are part of the bond, as was held in this very case.—Rives v. Toulmin, 19 Ala. As all intendments are against the pleader, the meaning of the replication is, that Rives had possession of the two slaves not sold, and could have sold them as provided by the deed; that no reason existed for not selling them; that defendant gave no consent not to sell, and derived no benefit from the failure to sell, but that Rives, without any excuse, allowed Magee to take them to New Orleans; that their value is $1600, which plaintiff will credit rather than be turned out of court.

The sale under the trust was a condition to be performed before defendant became a debtor at all: it was a condition precedent (1 Saund. Pl. & Ev., 122–5; 3 Ala. 330; 8 *ib.* 375; 9 *ib.* 320; 6 *ib.* 776; 4 *ib.* 336; 1 Porter 437; Minor's R. 414; 1 Ala. 153; 3 *ib.* 181; 7 Porter 133; *ib.* 508; Chit. Con. 663); and the time and place of sale were of the essence of the condition.—6 Sm. & M. 404; 19 Maine R. 147; 30 *ib.* 91.

But whether it was or not, plaintiff has not sold at all, but has allowed Magee to retain. He had no power to sell, except under and by virtue of the trust, and in the mode and manner therein prescribed. If he can thus act as to two of the slaves, why not as to three, four, or all? why sell at all? why not compute their value, deduct it from the debt, and sue for the balance? It is plain that, if a public sale (or any sale, rather) of two can be dispensed with, that of all can be. The value of the two slaves is $1600; but suppose they had brought more than that sum at a public sale, can the defendant be cut down to their value, when by his contract he has a right to the larger sale price? The parties had a right to have the sale made in their own town, in order that they might run up the property, get bidders, ascertain and know the sales, calculate and pay the balance without cost. If plaintiff sustains a loss, it is by his own wrong, his own disregard of duty, and he must suffer the legitimate effects of it. He may yet go on, and execute the trust, and then sue; this judgment will be no bar.

The position is assumed (strangely enough) that, because Rives has partly executed, defendant has been partly benefited, and therefore must pay as though there had been a full execution. Even if a change in the contract was for defendant's benefit, he is not bound by it unless he consents to it.—But how was this part execution a benefit to defendant?—Rives took the proceeds of sale; each act of execution of the trust was a step tending, not to benefit defendant, but to bring a liability upon him. Therefore the cases cited by plaintiff's counsel are without application. One owes nothing, but may become a debtor by the happening of a contingency; the approach of that contingency is called a benefit to him, and an argument is built thereon based on the assumption that he has received a partial benefit. Englishmen, in their pride, call their national debt a blessing.

Plaintiff says, it is a substantial compliance. Unless he had a right or power to sell in some other mode than that prescribed in the trust, there has been no sale at all, and of course no actual or substantial compliance; and, however ingenuity may twist the proposition, it comes to this: Can Rives recover without executing his trust, or showing an ex-

cuse for the omission, and hold the defendant liable by simply offering, at the trial, to credit the value of the trust property.

It is also argued, that the thing to be done is susceptible of division, and therefore part performance takes the case out of the law of condition precedent. In the same sense, there may be a part performance of every condition precedent. If an overseer contract to serve for one year, his performance is made up of parts; if one contract to build a house, his labor and materials consist of parts. But before any right to compensation arises, these parts must combine to produce a whole. So, in this case, each slave is a part of the whole; but all are to be sold, and the entire sale gives a result upon which the liability arises, and until the whole is done there is no liability. Argument cannot illustrate the statement.

GOLDTHWAITE, J.—It is clear that in this case, unless the plaintiff has done every thing which devolved on him to do, in order to perfect the liability of the defendant on the bond sued on, no action can be maintained upon it. Now what are the conditions on which the defendant agreed to pay? Magee was to make default; the plaintiff to be unable to collect the debt out of him by law; and the property conveyed by the trust deed to prove insufficient, on an execution of the trust, to pay the debt.—Rives v. Toulmin, 19 Ala. 388. Magee has made default, and has been sued to insolvency; but the trust has not been fully executed, as the replication shows that a portion only of the property embraced by the deed has been sold under it, and that the value of the property which was not thus sold was $1600. If this last condition was a precedent one, then the rule is well settled, that no action can be maintained, unless it has been performed.—Duke of St. Albans v. Shore, 1 H. Bla. 271; Smith v. Wilson, 8 East 347; Glazebrook v. Woodrow, 8 T. R. 366; Kingston v. Preston, 2 Doug. 688; Bailey v. White, 3 Ala. 320; Jones v. Somerville, 1 Porter 437. We do not understand this rule to be denied; but it is insisted for the appellant, that this condition is divisible, and may be performed in part,—that the part unperformed is capable of complete com-

pensation, and that the defendant, having received the consideration of the bond, which was the payment of the common debt by the plaintiff, shall be held upon the bond, at least to the extent of the part performed. We concede that, where covenants are mutual, and go to a part only of the consideration on both sides, and a partial performance is not inconsistent with the terms of the contract, and the part unperformed can be compensated, either by way of recoupment or damages, it cannot be insisted on as a condition precedent. The case establishing this doctrine is Boone v. Eyre, 1 H. Bla. 273, n. a, where the plaintiff conveyed to the defendant a plantation in the West Indies, in consideration of a sum certain, and an annuity for life of £160 per annum, and covenanted that he had a good title to the plantation, and was lawfully possessed of the negroes; and the defendant covenanted, that, the plaintiff well and truly performing all and every thing on his part to be performed, he, the defendant, would pay the annuity. In an action for the non-payment of the annuity, it was held no defence, that the plaintiff was not lawfully possessed of the negroes: and Lord Mansfield said: "The distinction is very clear: where mutual covenants go to the whole consideration on both sides, there they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent." This doctine has since been repeatedly recognized in the courts of Westminster (Duke of St. Albans v. Shore, *supra*; Campbell v. Jones, 6 T. R. 573; Havelock v. Geddes, 10 East 556); but we have found no case in which it has been applied, where the covenant clearly extends to the liability; and in the case cited as establishing the doctrine, had the covenant contained a provision that the defendant should not be required to pay the annuity unless the plaintiff was lawfully possessed of all the slaves, there could, we apprehend, be but little question that the covenant would have been held to be a precedent one, for it would then have gone to the liability, or, in the language of Bosanquet, J., in Lucas v. Godwin, 3 Bing. N. C., "have been of the essence of the contract." See, also, Addison on Con., 187, 188. Here the stipulation of the

defendant is, in effect, that he is only to pay on sale of the property under the deed of trust; and the parties evidently intended this should be done, as the amount he is to pay is to be ascertained by a reference to the sale so made. By the express agreement of the parties, therefore, this condition must be regarded as one on which the *liability* of the defendant depends, and must be held as a condition precedent, the performance of which must be shown, to entitle the plaintiff, in a suit upon the bond, to recover anything.

But it is said, that if the execution of the trust was a condition precedent, the replication shows that it has been substantially performed. We cannot so consider it. Courts will not, it is true, require the performance of every minute particular of a condition, unless the full and exact performance is part of the essence of the contract; or, in other words, unless, upon a fair construction of the covenant, such appears to have been the clear intention of the parties.—Addison upon Con., 188. But here, it is evident, the parties contemplated a sale of all the property under the deed: that is their contract. They have made the liability of the defendant to depend upon it; and having done so, we cannot change it: our duty is limited to construing contracts, but we are not at liberty to make them; and when the plaintiff has agreed that the defendant should only be held liable upon a sale of all the property, it would be establishing a most unsafe and dangerous precedent, to say that he should be permitted to pay the value of a substantial portion of it, instead of doing that which he agreed to do, in order to make the defendant liable.

The judgment must be affirmed.

COUTHWAY *vs.* BERGHAUS ET AL.

1. A judgment creditor by confession (if *bona fide*) is entitled to redeem real estate sold under mortgage or execution under the act of 1842; but the purchaser may, at his peril, compel a resort to equity to establish the *bona fides* of the debt.
2. If the bill alleges that complainant was a *bona fide* creditor at the time his judgment was confessed, and an exemplification of the record of the judgment is exhibited showing that it was founded on a note bearing date anterior to the defendant's purchase, the allegation is sufficient, without setting out the particulars of the consideration of the note.
3. If the judgment was confessed before the expiration of the time allowed for redemption, though after the sale, the creditor may redeem.
4. When the purchaser does not deny the existence of the indebtedness on which the judgment was confessed, but professes ignorance of it, and avers that he had offered to pay the amount of the judgment and retain the land, proof by one witness of his confession "that he had satisfied himself that the judgment was good, and that the right to redeem under it existed," is sufficient.
5. Although an agent to make a tender cannot delegate his authority to another, yet he may make the tender by letter sent by the hands of another.
6. If the purchaser only objects to the amount tendered, and declars that he is not satisfied that the complainant is a *bona fide* creditor, he cannot afterwards raise an objection to the authority of the person through whom the tender was made, nor to the fact that the money was tendered in bank notes.
7. Where the legal title is in a naked trustee, who has no interest whatever in the land and is a non-resident, while the *cestui que trust*, who can control the title, is in possession, and in perception of the rents and profits, the tender may be made to the latter.
8. The purchaser has not six months within which to make his election, but must make it within a reasonable time, and must notify the creditor of his election and tender a compliance: merely saying that he will pay the sum bid and retain the land, without offering to pay or securing the payment, amounts to nothing.
9. If the purchaser has extinguished a prior incumbrance on the land, he should be allowed the amount paid by him, with interest.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by the appellant, as a judgment creditor of Aaron Gage, to redeem certain lots in the city of Mobile, which had been sold under a mortgage executed by said Gage to one C. W. Dorrance, and purchased by the defendant Berg-

haus. The sale under the mortgage was made on the 4th day of June, 1850; the complainant's judgment was confessed on the 1st day of July, 1850; and the offer to redeem was made on the 3d of June, 1852, and renewed on the next day. At the sale Berghaus became the purchaser, but took the deed in the name of his sister Mrs. Kline, who was a resident of the State of Pennsylvania, and who is made a defendant with him. The chancellor dismissed the bill, holding "that a judgment confessed, without further proof of indebtedness, does not constitute a party a *bona fide* creditor under the redemption law of 1842, so as to entitle him to redeem;" and his decree is now assigned for error. The several points in the case are very fully presented by the briefs and opinion.

K. B. SEWALL, for the appellant:

1. The point on which the case was made to turn by the chancellor could not arise upon demurrer to the bill, and it did not arise on the issue made by the pleadings. The complainant made no allegations respecting any transactions with Gage, but simply set out her judgment and execution, referred to the exhibit as proof, and alleged that the judgment remained in full force. The defendant, in his answer, professed a want of knowledge as to the transactions between complainant and Gage, (which were not alluded to in the bill,) and then said "that the paper purporting to be a transcript of the judgment is not, as he is advised, properly authenticated, and therefore he prays that complainant may be held to strict proof of all her allegations touching the same." The answer, then, at most, put in issue the existence or proof of the judgment; and when the complainant, on the hearing, read in evidence an exemplification of the judgment, execution, and return, properly authenticated, she made strict proof of all her allegations. To require further evidence of indebtedness, therefore, was to require proof of what was neither alleged nor in issue, contrary to the universal rule which demands that the evidence must correspond with the allegations and be confined to the point in issue. It was a surprise which the complainant could not anticipate, and therefore had no opportunity to meet; the proceedings should have been suspended, under the views entertained by the court, that the

parties might take further proof.—Lamb v. Gatlin, 2 Dev. & Bat. Eq. 27.

2. But if the answer had impeached the judgment for fraud, and put in issue the *bona fides* of the debt, yet this would not have required the complainant to prove anything more than her judgment, execution, and return; for "fraud is never to be presumed, but must always be established by proof," and "*res judicata pro veritate accipitur*."—3 Greenl. Ev., § 254; Co. Litt. 103. It was incumbent on the defendant to offer some evidence to overcome the presumption of the *res judicata*, but he offered none; on the contrary, there was evidence of his own admission (to Barkaloo) of the complainant's debt.

3. But these considerations, which really dispose of the case, were wholly overlooked by the chancellor, and the decision placed on the insufficiency of a judgment by confession, without further proof, to entitle a person to redeem under the act of 1842. The question then arises, Is this a correct statement of the law, and is it sustained by authority? The chancellor, while admitting that the precise point has not been adjudicated, thought it had been "anticipated" in Thomason v. Scales, 12 Ala. 309, because the opinion in that case speaks of a "contestation." But the whole inquiry in that case was, as to the meaning of the term "*bona fide* creditors;" and the conclusion of the court (p. 315) is simply, "that the creditors spoken of in the statute are judgment creditors, and that no others are entitled to its privileges." Of Hooper v. Pair, 3 Porter 401, (if it can be considered law,) and Lamb v. Gatlin, 2 Dev. & Bat. Eq. 37, it is enough to say that they are not in point. In the only other cases cited (1 Cow. 443, 501) the judgments were by confession, without other proof, and the right of such a creditor to redeem was sustained as unquestionable. The Code does not purport to give a construction to the act of 1842, but repeals it, and adopts a provision on the subject materially different; and the fact of this change, excluding judgments by confession, is evidence that the prior statute, in the view of the Legislature, could not have that effect. But if the Code had expressly declared, that the act of 1842 should be construed to exclude from its privileges creditors who held judgments by confession, such a declaration would be beyond the constitutional power of the Legislature,

and would not have been sanctioned by the courts.—1 Kent's Com. 503. It was not even a case of doubtful construction; the decision in Thomason v. Scales, *supra*, had become incorporated in the act, and settled beyond doubt or construction the meaning of "*bona fide* creditors." Although the precise point has not been adjudicated in this State, yet in Pollard v. Taylor, 13 Ala. 608, the right of a creditor whose judgment is by confession to redeem under the act is admitted as unquestionable. This case is not cited as an authority in point, because it was not the point in the case, but as conforming to the decisions in 1 Cowen, *supra*, and showing the effect conceded to the judgments of all competent legal tribunals. The case of Reed v. Davis, 5 Pick. 388, is directly in point.—There the demandant in a real action, as evidence of his right, produced a judgment *by default* against one Bernard, and a promissory note on which it was founded, but no evidence of the consideration of the note; and impeached the deed under which the defendant held possession as being fraudulent as against Bernard's creditors. The tenant contended, that, as he held under a deed which was valid as to all persons except *bona fide* creditors of Bernard, the *onus* was on the demandant to prove himself a *bona fide* creditor, and that the note and judgment by default, without further proof that the note was given for a *bona fide* consideration, was not sufficient to establish that fact; but the court held, "that the note and judgment thereon were *prima facie* evidence that the demandant was a *bona fide* creditor of Bernard." A judgment by default stands on no higher ground than a judgment by confession, since it is but an implied confession of the cause of action alleged. The present, however, is a stronger case than the one just cited. Here, the judgment was founded on a promissory note, which, by statute, is made *evidence* of the debt for which it was given, and its execution can only be denied by a sworn plea: it was, therefore, founded on the highest evidence of legal liability admitted in our courts, and is consequently conclusive evidence that complainant was a *bona fide* creditor.

4. There is nothing in the object of the act of 1842, nor in the rights of the purchaser, which requires that the rule laid down in Thomason v. Scales, *supra*, should be further limited or restricted. The act was intended "to prevent the sacrifice

of real estate," and should be liberally construed.—Pollard v. Taylor, 13 Ala. 607. The purchaser knows that he gets a defeasible estate, of which he may be deprived within two years; but in that event he gets back his purchase money, with liberal interest, his "lawful charges," and "needful improvements." He is not surprised by an offer to redeem, nor injured by a redemption.

5. There is nothing in the nature or forms of judgments which, of itself, creates a distinction between them as to their effect. In whatever form they may be rendered—whether by default, confession, on demurrer, or on verdict—no distinction was recognized, as to their conclusiveness and effect, either by the common or civil law. A judgment by confession is as old as the law itself, and has never been discouraged, nor regarded with suspicion.—Pand. D., 42, 2 pr. 6; C. 7, 59, 1; Dom. p. 828.

6. There is no reasonable ground for a distinction, founded on the mode in which judgments are obtained. Fraud or collusion between the parties may be as easily practiced, when the judgment is on demurrer, *nil dicit, non sum informatus*, or by default, as when obtained by confession. No form is, in itself, a protection against fraud; and it should not, therefore, be made the criterion of the *bona fides* of the debt which it represents.

7. It is said that the judgment is *res inter alios acta*, and therefore not conclusive on Berghaus. The same objection would apply equally if the judgment were on verdict; and no creditor would then be entitled to redeem without further proof of indebtedness, unless the purchaser was party or privy to the judgment. But the rule as to *res inter alios acta* does not apply to the case: a judgment is always admissible to prove the fact that it was rendered, and it is conclusive against the purchaser unless impeached on the ground of fraud or collusion.—1 Greenl. Ev. §§ 538, 539; 1 Stark. Ev. 295–6.

8. The objection that Adams and Barkaloo were not authorized to make the tender, because Chamberlain could not delegate his authority, cannot avail. The tender was made on behalf of the complainant, through her authorized agent, and she has since ratified and confirmed his acts: this is sufficient.—Story on Agency, §§ 244, 249; Goodtitle v.

Woodward, 3 B. & Ald. 689; Alderson v. Harris, 12 Ala. R. 580; Everett v. United States, 6 Port. 166.

9. The objection that most of the money tendered was in bank notes was not made at the time of the tender, and therefore cannot be made now.—Sewall v. Henry, 6 Ala. 226.

HOPKINS, JONES & LOMAX, for the appellee:

1. It has been held by this court, in construing this redemption law, and by other courts construing similar laws, that "the terms prescribed by the statute must be strictly pursued, to entitle the creditor to redeem."—Barringer *et al.* v. Burke, 21 Ala. 771, and other cases cited below.

2. The statute says, a *bona fide* creditor may redeem. It was necessary, then, for Mrs. Couthway to show by her bill, and by her proof, that she was a *bona fide* creditor. It is submitted that it is not sufficient for her to allege, in general terms, that she was a *bona fide* creditor: she should show the particular facts which constitute her a *bona fide* creditor. How did she become a creditor? Was it by selling property to Gage? or by lending money to him? or how? She no where shows how, or by what means, she became a creditor. The only allegation in the bill on this point is: "That on the first day of July, 1850, your oratrix, by the consideration of the City Court of Mobile, recovered a judgment against Aaron Gage, being a *bona fide* creditor, for the sum of eleven hundred and thirty six dollars and sixty-six cents," &c., and in looking at the transcript of the judgment, it appears to be a judgment by confession; and it is to be further remarked, that she does not allege that she was a creditor of Gage, until after Berghaus' purchase. On these grounds, the bill was fatally bad on the demurrer which was interposed.

3. But as against Berghaus, who was not a party to the suit against Gage, a judgment by confession is no evidence of Mrs. Couthway being a *bona fide* creditor. In this respect, the judgment by confession, however binding it may be as between the parties to it, is no evidence of *bona fides* as against third persons. If so, all that a debtor, whose property has been sold under execution or mortgage, need do, is, after the sale (as in this case) to go into court and confess judgment in favor of his mother-in-law, or some other confidential friend,

and such friend can then come foward, and without making any other allegation or showing of being a *bona fide* creditor, may redeem the land, and thus not only deprive the purchaser of the benefit of his bargain, but other creditors of the right of redeeming. Such a door for fraud ought not to be opened. This court, by its previous decisions, has sufficiently settled the law on this point. In the case of Thomason v. Scales, 12 Ala. 309, this court decided, that none but a judgment creditor can redeem,—none but a judgment creditor is to be deemed a *bona fide* creditor within the terms of the act; and the court says (12 Ala. 312): "that in prefixing the emphatic term *bona fide*, such an ascertained claim as the law presumes to be *bona fide* was intended, because it is ascertained to be due by the judgment of a court, after a contestation." This was the construction put by the judiciary on this act; and it has been expressly approved by the court in subsequent cases, especially in Barringer v. Burke, 21 Ala. 771.

The framers of the new Code have embodied this idea in the Code (Code of Ala., § 2120); and the Legislature has, by adopting the Code, expressed its concurrence in this construction. The language of that section of the Code is: "All judgment creditors of the debtor," &c., "except by confession of the debtor, may in like manner redeem," &c. This is but expressing in more explicit terms, as it was the duty of the codifiers to do, what the courts had held to be the true construction of the law. But it had been previously held by this court in Hooper v. Pair, 3 Port. 401–404, that a judgment by confession, or default, was no evidence against a third person that the defendant was indebted to the plaintiff at the time it was rendered. The same principle is laid down in respect to a decree by confession, in Lamb v. Gatlin, 2 Dev. & Bat. Eq. R. 37. On precisely the same principle, this court has repeatedly decided, that recitals of consideration in a deed, or a statement of the indebtedness of a grantor in a deed of trust, in notes, or otherwise, is no evidence of *bona fides*, as against third persons.—McCain v. Wood, 4 Ala. 258; Br. B'k at Decatur v. Kinsey, 5 *ib.* 9. The confession of judgment by Gage, made after Berghaus' purchase, was certainly no evidence against Berghaus.—Goodgame v. Cole, 12 Ala. 77, 81. There was, then, not only no such allegation as

we insist was necessary, but no legal proof at all that Mrs. Couthway was a *bona fide* creditor of Gage. It was on this clear ground that the chancellor dismissed the bill.

4. There are other grounds on which the decree dismissing the bill can be sustained. We have seen that the creditor, to entitle himself to redeem, must bring himself strictly within the terms of the act. The whole tenor of the law shows, that it only intended to give the right of redemption to an existing creditor, one who was a creditor, either absolutely or contingently, at the time of the sale. One who becomes a creditor subsequently to the sale has no such right. If this be so, it is indispensably necessary that the creditor should allege in his bill that he was a creditor, absolutely or contingently, at the time of the sale. No such allegation is made in this bill. It would be fatally defective, on demurrer, for the want of such an allegation. But there is not only no such allegation, but on the contrary the bill itself expressly alleges that the sale was made to Berghaus on the 4th of June, 1850, and that the plaintiff became a creditor of Gage on the 1st of July, 1850, nearly a month after the purchase by Berghaus. The case of Pollard v. Taylor, 13 Ala. 604, is not in conflict with this view, but rather sustains it; for there the debt against Ball, under which the redemption was allowed, existed before the sale, and Taylor, as accommodation acceptor, was considered as subrogated to the rights of the holder of the bill.

5. The statute requires the offer to redeem, and the tender, to be made by the creditor. Certainly a stranger cannot make it. It may be conceded that, though the statute does not in terms authorize the offer to be made by the agent or attorney of the creditor, yet it may be made by the agent or attorney. Certainly the purchaser, when the offer is not made by the creditor in person, has a right to call for and see the authority of one making the offer professedly as the agent of the creditor. Now, in this case, the offer was not made by Mrs. Couthway, in her own proper person, nor by her agent or attorney: the evidence shows that she was then absent from the State; but she had executed a power of attorney to Henry Chamberlain, authorizing him, as her attorney, to make the offer, but not authorizing him to substitute or ap-

point any other person. Now the offer was not made by Chamberlain, but by Mr. Adams, at Chamberlain's request. The maxim is, "*delegatus non potest delegare.*" Chamberlain could not appoint Adams in his stead; and so the tender and offer to redeem was not made by Mrs. Couthway, or her agent or attorney.

6. The offer to redeem was not made to the proper person. At the sale by the master, the property was bid off by Berghaus, and he paid for it; but being indebted to his sister, Mrs. Kline, for the purpose of securing her, the deed was made by the master, Parker, not to Berghaus, but to Mrs. Kline. The legal title was thereby vested in Mrs. Kline, and, so far as appears by this record, is still in her. It may be true that, in equity, it is Berghaus' property. At the time the offer to redeem was made, the plaintiff knew the legal title was in Mrs. Kline; she did not know in whom the equitable title was. The fair presumption was, that the whole title was in Mrs. Kline. Certainly an offer to redeem, made to Mrs. Kline, would have been proper and sufficient. That point was expressly decided in Barringer v. Burke, 21 Ala. 765. The offer to the trustee is sufficient. The question whether such an offer to the *cestui que trust* is sufficient, is stated in that case, but not decided by the court. It is obvious, however, that no person but one holding the legal title, can possibly comply with the offer; and it seems to follow as a necessary consequence, that the offer to the *cestui que trust* will not do.

7. The offer to redeem was not only made by the wrong person, and to the wrong person, but the manner of it was wrong also. Mr. Adams states, in his deposition, that he had with him, at the time he made the offer, $6700 in bank notes. He says, that when he made the offer to redeem, Berghaus said he was not satisfied Mrs. Couthway was a creditor of Gage, and said, in general terms, that the amount offered was not sufficient; Berghaus declined counting the money when Adams produced it; did not object to its being in bank notes; he used the expression, "you may consider it a tender; I do not." No matter how Mr. Adams may have understood this expression, it is submitted that its only fair interpretation is, that he did not consider the bank notes a good tender;

and no legal tender was made. Adams no where states (nor any other witness) that when Berghaus was called in to convey the land, it was proposed he should do it at Mrs. Couthway's cost. He was not asked to convey in his own name, but in Mrs. Kline's name.

8. By the statute, rights are reserved to the purchaser. It is held by this court, that he has a right to call for evidence that the party offering to redeem is such a creditor as has a right to redeem. This requires some time for examination. He is not bound to re-convey absolutely; he has a right of election, either to re-convey, or to "pay or secure to be paid, within six months," to the creditor offering to redeem, the sum proposed to be advanced by him. Certainly the purchaser is to have a reasonable time, at least, to make this election. By the punctuation and grammatical construction of the statute, it gives him six months within which to make this election. Two days afterwards Berghaus offered to pay $1250 to Mrs. Couthway and keep the property. This offer was first made the 5th of June, 1852, and repeated on the 7th of June. It was within a few dollars of the whole amount of her judgment and interest, but was not accepted. This refusal was in violation of Berghaus' rights. There is nothing in the statute which requires the purchaser to make this election *instanter*, or within two years after his purchase. He made his election in two days, (that certainly was within a reasonable time,) and notified his election. Then the plaintiff had no right to file her bill, as she did, before the expiration of the six months.

CHILTON, C. J.—In Thomason v. Scales, 12 Ala. 309, it was held, that to entitle the creditor to redeem the land of his debtor under the act of 1842, "to prevent the sacrifice of real estate," he must have ascertained the *bona fides* of his demand by obtaining a judgment. A judgment was obtained by the appellant in this case against Gage, her alleged debtor: but it was by his confession; and the question is, was this such a judicial ascertainment of the debt, as authorized her to demand a redemption.

It is argued that, if such right may be claimed under a judgment of this character, a wide door would be opened for

fraud and collusion; and that to constitute a *bona fide* creditor, there must be a judgment after a contestation. Perhaps it would be impossible, after the greatest circumspection and caution, effectually to provide against fraud in all cases. Were we to hold that the record of the judgment must show a contest between the parties, even then such contest might be feigned or collusive. And what evidence will suffice to show such contest? a demurrer, or plea, or judgment on the verdict of a jury? Every one knows the record may so speak, and yet the judgment be rendered apon a colorable or fraudulent demand. The parties may have so arranged as to build up the demand, and to invest it with these apparent solemnities, as a better shield against the exposure of their fraud. It is very apparent then, that the evidence which a record would ordinarily furnish of a contest, would afford very little additional proof of the *bona fides* of a demand, beyond what a judgment by confession would exhibit; both are conclusive as against a defendant in the judgment, but neither of them has this effect as against third persons who are strangers to it. They are alike conclusive evidence that such judgments exist; but whether founded on a *bona fide* claim—in other words, whether they are not fraudulent as against third persons, is a question which strangers may discuss.

The annotators upon Phillips' Evidence (vol. 3, pp. 820, 821) have clearly stated the distinction which we wish to illustrate. "A verdict or judgment," they say, "is offered, either to establish *the mere fact of its own rendition, and those legal consequences which result from the fact;* or it is offered with a view to a collateral purpose,—that is, to prove not only the fact that such verdict or judgment has been rendered, and so let in all the legal consequences; *but as a medium of proving some fact as found by the verdict, or upon whose supposed existence the judgment is based.*" For the first named purpose, that is, to prove the judgment itself *as a fact and its legal consequences*, the record of it is admissible against strangers, but not as proof of any fact on which it is based. See, also, Phillips' Ev., (C. & H. notes,) vol. 3, pp. 821,–2,–3, notes 582,–3.

The appellant being a judgment creditor of Gage, one of the consequences resulting from the judgment is, that she is

entitled, by reason of this record evidence, to make application to redeem his lands, which are subject to redemption; and if the appellee, seeing that Gage is concluded by the judgment, is unwilling to repose upon this record evidence, he may put the complainant upon the proof of the existence and *bona fides* of her demand,—may, at his peril, refuse to yield to it, and compel her to resort to chancery, where he can contest with her the justness of her claim. We think we might, with the same propriety, and for equally strong reasons, hold that a judgment by confession or default constitutes no lien,—that a plaintiff in an execution issued upon it should not be permitted to try the right to property so as to subject it for its satisfaction; or that, upon a return of "no property found," the plaintiff might not resort to equity to subject the equitable estate of the debtor in the hands of a trustee. It does not follow, however, that because Mrs. Couthway has a judgment, which she must have before she can redeem, she is a *bona fide* creditor. The statute (Clay's Digest, 502,-3) does not confer the right of redemption upon judgment creditors merely: they must be *bona fide* creditors who have judgments. The reasons, in part, no doubt, upon which the courts have held a judgment was necessary, were to cut off disputes and uncertainty as to the amount which the debtor owed to the creditor, and to protect the latter from having his own right to redeem embarrassed by claims which he never acknowledged. Be this as it may, we think the fact that the judgment was confessed does not cut off the appellant's right to redeem.

The case of Hooper v. Pair, in 3 Port. 401, is not opposed to the views we have expressed. The claimant, it was very properly held in that case, could not controvert the *bona fides* of the judgment of the plaintiff in execution, because such contest was without the issue; and as to the judgment under which the claimant made title, it was held no evidence of the existence of a demand against the defendant in execution in favor of the claimant, as the plaintiff in execution was neither a party nor privy to it. True, some stress is laid by the learned judge who delivered the opinion upon the fact, that it was by default, &c.; but we apprehend the same result would have followed, however much it had been con-

tested, as the plaintiff in execution should not have been held bound by a contest to which he was a total stranger.

But it is insisted by the counsel for the appellee, that the bill is defective, in that it fails to show when the debt accrued, or that the complainant was a *bona fide* creditor when Berghaus bought the land. The charge is, that "on the first day of July, 1850, oratrix, by the consideration of the City Court of Mobile, recovered a judgment against Aaron Gage, being a *bona fide* creditor, for the sum of eleven hundred and thirty-six dollars and sixty-six cents," &c; and an exemplification of the record of recovery is set forth as an exhibit to the bill, from which it appears that the judgment was on a note bearing date anterior to the purchase by the appellee.—This, though not very formal, we think is sufficient. It is not necessary that the complainant should go into the particulars of the consideration of the note upon which the judgment was founded. The charge that it is a *bona fide* indebtedness, with an exhibit of the evidence of it, is all that is required. If *bona fide*, it existed when the evidence of the demand was given, and this was before the sale.

That the judgment was obtained after the sale, but before the expiration of the time for redeeming, as fixed by the statute, was held, in Pollard v. Taylor, 13 Ala. 604, to be sufficient to authorize such creditor to redeem.

But, the counsel for the appellees say, the judgment not being evidence of a *bona fide* claim or demand, there is no proof in the record to show that Mrs. Couthway was a *bona fide* creditor. The proof of this fact is found in the admission of Berghaus to Barkaloo, on the 4th of June, 1852, that "he had satisfied himself that the judgment was good, and the right to redeem under it existed." The answer does not directly deny indebtedness on the part of Gage to Mrs. Couthway, but merely that the respondent is ignorant respecting it. The feeble denials of the answer, weakened as it is by partial concessions of the right to redeem, and the averment that the defendant offered to pay the amount of complainant's judgment, coupled with the proof made by Barkaloo, we think sufficient to justify the conclusion that the demand exists as it appears of record, and to dispense with the necessity for further proof.

Again; objection is made to the tender, first, because it was not made by the proper person. It is said the appellant herself, or Chamberlain, her attorney in fact, should have made it; whereas it was made by one Adams. We recognize fully the rule, that an agent, without authority given him by his constituent in that behalf, cannot delegate his authority and powers to another. But this does not imply that Chamberlain must carry the money, instead of sending it, or that he, instead of some one else, must count down the money. The tender was substantially made by Chamberlain, through his letter to Berghaus, borne by Adams, who took the money and offered it to him; and it is clear from the record that the appellee so understood it: for he had an interview, and also wrote to Mr. Chamberlain in regard to it, recognizing him as the actor in the matter. Besides, he made no objection to the want of authority in Mr. Adams at the time. His reasons for declining the redemption were, that the amount tendered ($6700) was not enough, and that he was not satisfied that Mrs. Couthway was a *bona fide* creditor. It would be unjust to allow him to spring other objections afterwards, which could readily have been remedied at the time, and doubtless would have been but for the implied waiver. It is upon the same principle that the tender of bank notes is sufficient, unless objection be made to them for that reason.—In this case, no specific objection of the kind was made, and the party might fairly imply that the same was waived.

It is further urged by the counsel for the appellee, that the tender was made to the wrong person—that it should have been made to Mrs. Kline. It is admitted, that she was a mere trustee, without any interest in the land, and that she holds the title to the same for Berghaus, who has the possession, and is in perception of the rents and profits, and can control the title. Under these circumstances, she being a non-resident, we think it clear the appellant was not bound to go to her place of residence, at a great distance beyond the State, to make a tender to her. The money was not due to her, but to the party who paid it, and to whom the tender was made. It appears that the appellant was content to receive the conveyance from him as her agent, which agency he did not then deny; and it did not lie with him to say, I have

caused the legal title to be lodged in a person a thousand miles distant, it may be; you must search for her and get the title, or you cannot redeem. If such embarrassments could be thrown in the way of redemption, it would be rendered, in many cases, useless; and as the land, by reason of this statute, generally sells for less at the first sale than it would otherwise command, that which the act was designed to prevent—the sacrifice of it—would be the result.

As to the objection, that it was not proposed that the conveyance upon redeeming was to be at Mrs. Couthway's cost, it is only necessary to say, that Mr. Adams proves the conveyance was to be furnished by him, he acting at the request of Mr. Chamberlain.

It is further argued by the appellee's counsel, that he had six months, after the tender, to make his election whether to convey or pay the sum offered to be credited by the appellant, and that the bill was prematurely filed before the expiration of that period. Such is not the proper construction of the statute. His election must be made in a reasonable time, and he must notify the opposite party of his determination and tender a compliance. Merely saying that he should pay the sum bid and retain the land, without offering to pay, or securing it as required by the statute, amounts to nothing.—But if he had made a tender, he does not continue it in his answer, but seeks to bar the complainant's right, leaving the land as it was.

Whether the amount tendered was sufficient to refund the purchase money, with the per cent. allowed by law, and whether the rents and profits will leave a balance due for improvements, are questions which can be settled upon a reference. The amount which the appellee paid to extinguish the incumbrance of Stewart & Easton, with lawful interest, should be refunded him, as on the payment he became subrogated to the rights of the mortgagees, and should not be divested of the lien, if it constituted a prior incumbrance, without being refunded the amount paid and interest.

Upon the case presented, we think the decree of the chancellor erroneous; it is consequently reversed, and the cause will be remanded, that a decree may be rendered in conformity with the views expressed in this opinion.

DUNCAN & HOOPER *vs.* STEWART.

1. A grant of letters of administration on the estate of a living man, who is supposed to be dead, is absolutely void; and if the administrator sells the personal property, under an order of court regularly made, he is a trespasser.
2. But the purchaser of a slave at the sale cannot, while holding possession under the contract, or if the slave has died while thus in his possession, resist the payment of the note given for the price, if sued by the administrator; and if, on the re-appearance of the supposed decedent, the administrator assigns the note to him by endorsement, the assignee may sue on it in his own name, and recover, notwithstanding the death of the slave prior to the endorsement.
3. Where one assumes to act in a particular capacity, he will be estopped from denying the position which he has taken, when such a denial would operate to defeat rights attaching to the contract itself; but the doctrine of estoppel does not extend to matters affecting the remedy merely, which are entirely foreign to and disconnected from the contract, or the character in which the parties entered into it.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. JOHN GILL SHORTER.

ASSUMPSIT by Samuel J. Stewart against the appellants, on a promissory note, of which the following is a copy:

"$1085. By the 14th day of December next, we promise to pay William Davis, administrator of Samuel J. Stewart, or bearer, one thousand and eighty-five dollars, for value received, this 11th Jan'y, 1851. (Signed) BRYANT DUNCAN.
GEO. D. HOOPER."

The plaintiff declared on this note as endorsee of the payee, and added the common money counts; and the defendants pleaded, "*non assumpsit*, with leave to give in evidence anything which might be specially pleaded in bar." On the trial, after the plaintiff had read in evidence the note and endorsement, the defendants proved that the note was given for the price of a slave which the said Duncan had purchased at a public sale, made by said Davis as the administrator of said Samuel J. Stewart, under an order of the Probate Court; that letters of administration on the estate of Stewart, who had not been heard of for eight or ten years, and was supposed

to be dead, had been granted to Davis previous to the said sale, (the date is not stated,) and that the slave then belonged to Stewart; that Davis, as administrator of Stewart, gave said Duncan a bill of sale to the slave, which was read in evidence, and that the slave went into his possession under the sale, and remained in his possession until December, 1851, at which time the slave died; that Stewart re-appeared in Russell county in January, 1852, and made inquiries after his property, and received from Davis the note in suit, the endorsement being dated February 9, 1852.

This being all the evidence, the court charged the jury, that, if they believed it, they must find for the plaintiff; to which charge the defendants excepted, and they now assign it for error.

WHITE & PARSONS, for the appellants:

1. This declaration contains a special count on the note and endorsement, and the money counts. The record shows the slave was never converted into money by Duncan, but died in his possession in December, 1851. Therefore there can be no recovery on the money counts.—Crow v. Boyds, 17 Ala. 51; Jones v. Hoar, 5 Pick. 285; 1 J. J. Marsh. 543; 3 Dana 552; 3 Watts 277. In addition to this, there is this further reason: Hooper is in no way connected with any act of conversion, and if not liable on the note, he is not liable at all. He has the right to stand upon the precise terms of the contract which he signed.—McKay v. Dodge, 5 Ala. 388.

2. The record shows this note is a portion of the assets of the estate of Stewart. Davis, the administrator, therefore, could not transfer a title to it by his endorsement, so as to enable Stewart to sue on it in his own name.—Harbin v. Levi, 6 Ala. 399; Dunham v. Grant, 12 *ib.* 105. These cases "are not controverted" in Tompkies v. Reynolds, 17 Ala. 115, and their doctrine is distinctly admitted by this court in a subsequent case—Arrington v. Hair, adm'r, 19 Ala. 244. The charge is therefore erroneous on this ground. It is no answer to say, the endorsement is to the real owner, who turns out to be alive, instead of dead. This is an evasion of the question. The question is, whether this note is the evidence of a contract that can be transferred by endorsement to another.

The decisions referred to show most conclusively that it is not, and that it cannot be transferred.

3. The evidence shows that the Orphans' Court of Russell county had no jurisdiction to grant administration on Stewart's estate. This renders the whole proceeding void, and all that was done under it is void also. This is conceded by defendant's counsel, and they rely on a ratification in February, 1852, the slave having died in December previous. We do not dispute that an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. But we do insist "that a ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person."—Story on Agency, § 251; Wilson v. Tumman, 6 Man. & Gran. 236. It is also said: "When the party making the contract had not a shadow of authority to contract for the third person, and did not profess at the time to act for him, it seems that the subsequent assent of such third party to be bound as principal has no operation."—Chitty on Cont. (8th Am. ed.) top p. 202; Saunders v. Griffiths, 5 B. & C. 406. "The rule as to ratification applies only as to the acts of one who professes to act as the agent of a person who afterwards ratifies."—Vere v. Ashby, 10 B. & C. (21 Eng. Com. L.) 82; Wilson v. Tumman, 6 Man. & Gran. 235.

The ratification must be of the whole transaction, or of none; it cannot be ratified in part, and repudiated as to the balance.—Story's Agency, § 250; Wilson v. Poulter, 2 Stra. 859; Smith v. Hudson, 4 Term R. 211; Hovil v. Pack, 7 East 164; 8 Pick. 56; 19 *ib.* 300.

This administrator sold all the title, &c., of Saml. Stewart; he did not warrant in terms; but suppose he had, he would not be personally liable, for he did it as administrator, and the benefit enures to the estate.—Craddock v. Stewart's Adm'r, 6 Ala. 79. Could Stewart be made liable for a breach of soundness, if this bill of sale had contained it? or, if there had been a deceit, would he be liable for it? Clearly he would not be liable for either,—yet he gets all the benefit of

the contract, and is not liable for anything. As to Davis' liability as agent, see Story's Agency, § 265; Smout v. Ilbery, 10 Mees. & W. 1; Story's Agency, § 263.

This ratification came too late. The negro died in December, and Stewart did not do any act tending to show a ratification until February thereafter. Whose slave was he at the time of his death? Clearly and unquestionably Stewart's. He had done nothing which tended towards a sale at that time. Suppose Stewart had attempted to sell, and actually did sell, Duncan this dead slave on the 9th of February, 1852, they both supposing him to be alive at that time; would it be a valid and binding contract? Certainly not. It lacks one of the essential elements of a contract, viz., a subject-matter. Parsons on Agency 44-5, note t, and cases cited in note t.

The parties contracted under a mistake of fact. "An error in fact takes place, when some fact is supposed to exist which really does not exist."—20 Wend. 174; 1 *ib.* 360; Bell v. Gardner, 4 Man. & Gran. 11; Kelly v. Solari, 9 Mees. & W. 54; 17 Mass. 33; 4 Dallas 234; 10 Wheat. 333.

BELSER & RICE, *contra:*

An administrator, with whom as such a contract is made, acquires a right thereto as an individual, if he acted without authority and did not bind the estate.—Reynolds v. Tompkies, 17 Ala. 109; Harbin v. Levi, 6 *ib.* 399; Hall v. Chenault, 13 *ib.* Davis, therefore, might have sued individually on the note, and his assignee would have the same right. But he might also have sued as administrator, and the defendants, in either case, would have been estopped from saying that he never was administrator, or from setting up any defence based upon the idea that he never was administrator.—Harbin v. Levi, *supra;* Worthington v. McRoberts, 7 Ala. 814; Griggsby v. Nance, 3 *ib.* 347; Hewes v. Parkman, 20 Pick. 90; Rotch v. Hawes, 12 *ib.* 126. And if the defendants would have been thus estopped as against Davis, they are equally estopped as against the assignee of Davis.—McCravey v. Remson, 19 Ala. 430; Barclay v. Moore, 17 *ib.* 634.

If Davis had no authority as administrator, and did not therefore bind Stewart, nor his estate, he bound himself personally by the contract.—Whiteside v. Jennings, 19 Ala. R.

Suppose Stewart, before ratifying the sale, had sued Duncan for the conversion of the slave, even after his death; he must have recovered, for the purchase by Duncan from Davis was a conversion. This recovery would have been a breach of the contract on the part of Davis, who sold "all the right of Stewart" to the slave; and Duncan could then recover the value from Davis.—Pinkston v. Huie, 9 Ala. This shows that the contract was not void, but might be enforced by Duncan; and if by Duncan, it may also be enforced by Stewart, or his assignee.—Chenault v. Hall, 13 Ala.; Reynolds v. Tompkies, 17 *ib.* 109; Barclay v. Moore, *ib.* 634.

The retaining of the bill of sale by Duncan is an affirmance of the contract on his part, and estops him from setting up its invalidity: so long as he retains the benefit derived from the contract, he cannot rescind.—Kimball v. Cunningham, 4 Mass.; Dill v. Camp; 22 Ala. The want of authority, and want of title, in Davis, to sell the slave, is no ground for setting aside the contract.—Pool v. Hodnett, 18 Ala. 752; Lamkin v. Reese, 7 *ib.*; Alderson v. Merrill, 12 *ib.* 580; New York v. Buffalo, 2 Hill (N. Y.) 438; Barnett v. Stanton, 2 Ala. 182; Emanuel v. Dane, 3 Camp. 299; Blay v. Street, 2 B. & Ad. 456; Power v. Wells, 2 Cowp. 818; 10 Watts 109; 2 Hill 288; 4 *ib.* 626; 12 Wheat. 193.

Whenever the owner of goods can maintain trespass or trover for them, he may, if they have been sold, waive the tort, and maintain *assumpsit* for the proceeds of the sale.—Young v. Marshal, 21 E. C. L. Rep. 215; Sturtevant v. Waterbury, 2 Hall (N. Y.) 453; Cobb v. Dows, 9 Barb. (S. C.) R. 245; Chitty on Contracts, p. 22, and notes; Upchurch v. Norsworthy, 15 Ala. 708. The taking of Duncan's note by Davis was, in law, the same as receiving the money.—9 Ala. 803. As Stewart, then, might have maintained trover against Duncan or Davis, the latter might lawfully pay over to him, without suit, the proceeds of the sale to Duncan, viz., the note here sued on; because a man may always voluntarily do without suit what the law would compel him to do by suit.

The fallacy in the defendants' argument lies in assuming that, whenever the authority of an administrator is void, all contracts made with him are void, and that any party contracting with him may, on that ground, defeat any promise

made to him, although the promisor obtained all he contracted for. The note is not void, although the administration was void. For illustration: a sale of land without a writing showing the terms of the sale, is void by the statute of frauds, yet, if the purchaser gives his note for the price, the note is not void.—McRae v. Russell, 12 Ired. Law R. 227. Duncan got all that he could have obtained if the administration had been valid.

Stewart is equally entitled to recover, whether the administration was valid or void. If valid, it is too clear for argument that he must recover. If void at all, it is void to all intents and purposes, as in fact it is, (*In re* Charles Napier, 1 Eng. Ec. R. 44); and stripping the case entirely of it, it presents the plain case of A selling B's property without authority, and B ratifying the sale, by accepting the note for the price, and bringing suit upon it.—Upchurch v. Norsworthy, 15 Ala.; Reynolds v. Tompkies, 17 *ib.* 109; Nelson v. Lovejoy, 14 *ib.* 568; New York v. Buffalo, 2 Hill 438; Motley v. Man. Ins. Co., 29 Maine 337; Whitsett v. Womack, 8 Ala.

GOLDTHWAITE, J.—Although the main question in the case is one of first impression, we regard it as a very clear one. The party on whose estate the letters were granted was not dead; consequently the court acted without jurisdiction, and the administration was void.—Wms. on Ex. 400-1-2, and cases there cited. Davis, who acted as administrator, was a trespasser, and he stands as a wrong-doer selling property without title; but under such circumstances, the purchaser, while he holds under the contract of sale, cannot resist the payment of the purchase money.—Ogburn v. Ogburn, 3 Por. 126. There is nothing in the form of the note, which would prevent Davis from suing in his own name, and declaring on the note as made to himself personally, as the additional words "administrator," &c., would be held merely as words of description (Harbin v. Levi, 6 Ala. 399); and if he could recover, his assignee could, if the assignment passed to him the legal right of action in the note.

Here a technical principle is invoked in behalf of the appellants, and it is urged that, as the record shows that Davis, the payee, took out letters of administration, and made the

sale in his representative capacity, and the note was given upon this sale, Davis is concluded from denying that he was administrator, or from recovering in an action brought in his own name upon the contract, as if made to himself personally; that the appellee, as his privy, by assignment, occupies no better position, and the note, in this aspect, must be regarded as assets, and therefore no title or right of action could be derived from the assignment. Conceding, as to this argument, that the administrator could not, by virtue of his authority, assign a note which was assets of the estate he represented, so as to invest the assignee with the legal title, the question is, whether Davis, upon the facts as we have stated them, would, in a suit upon the note, be concluded from showing that it was not assets. As to the proceedings of the court which granted the letters and ordered the sale, as there was no jurisdiction, these acts amount to nothing, and Davis would not be bound by them, any more than a plaintiff would be bound by a judgment in his favor, rendered by a court which had not power to take cognizance of the case. But is he concluded, without reference to the action of the court, because he made the sale in his representative character? It is true, that where one assumes to act in a particular capacity, he will be estopped from denying the position he has taken, when such denial will operate to defeat rights attaching to the contract itself,—the law regarding his assumed character as a real one, so far as it enters into it: but we do not understand the doctrine of estoppel to extend to matters, affecting the remedy only, entirely foreign to and disconnected from the contract, or the character with which it was entered into by the contracting parties. Here, the rights of the appellants, growing out of the purchase, have no legitimate connection with, and are not in the slightest degree affected by, the fact as to whether it was assets or not. They can assert all the rights arising from the contract by way of defence, precisely the same as if the note was assets and had not been transferred, and can avail themselves of every equity against the assignee equally as against the assignor. As there was nothing that forbid the plaintiff below from showing that the note was not assets, and as the necessary proof was made upon this point, the assignment invested Stewart with the legal title. Con-

sidering the right of Davis to recover on the note, until the purchasers had taken the necessary steps to rescind, or until the real owner had recovered the property or received satisfaction for the wrong, as clear, and the right of the appellee follows necessarily. Had the former collected the note, or had he received the proceeds of the sale in money, or anything in the place of money, the real owner could have waived the tort, and recovered in *assumpsit*.—Young v. Marshall, 21 Eng. Com. Law 215; Sturtevant v. Waterbury, 2 Hall (N. Y.) Rep. 453. So he could have received any property in satisfaction. Here the evidence shows he received a note, on which the payee could have sued and recovered, and became invested with the right to sue by his assignment. The purchaser has got everything that he contracted for, and thus complete justice is done.

Judgment affirmed.

JENNINGS *vs.* BLOCKER'S ADM'R.

1. When slaves go into the possession of husband and wife, under a verbal gift from the wife's father to her sole and separate use, if the husband elects to treat them as her separate property, and holds and controls them as her trustee until her death, his marital rights cannot afterwards be asserted, but the property vests absolutely in the wife's personal representative.
2. And if the husband afterwards places the slaves, as a nurse for his infant child, in the family of the donor, who subsequently executes a mortgage on them, which mortgage is purchased by one who is cognizant of all the facts, and who afterwards, without foreclosure, sells by quit-claim to another, the wife's administrator may recover against such derivative purchaser.
3. The declarations of one who is in possession of personal property, in disparagement of his own title, are admissible evidence against a subsequent derivative purchaser from him.
4. A recital in a will made by the donor at the time of the gift to his daughter, though of no efficiency as a muniment of title, is relevant testimony as tending to show the gift, and is admissible as part of the *res gestæ*.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. TURNER REAVIS.

DETINUE by the appellee, as the administrator of Mrs. Mary J. Blocker, deceased, against Samuel K. Jennings, the appellant, for a slave named Miranda and her four children. The plaintiff claimed under a parol gift to Mrs. Blocker from her father, William Murphy; while the defendant derived title under a mortgage subsequently executed by said William Murphy to the Branch Bank at Mobile, which was purchased by William M. Murphy, the son of said William Murphy, who afterwards sold to the defendant without warranty.—The rulings of the court, in the admission of testimony objected to, and in the charge given, are assigned for error; and these will be readily understood from the statement of facts contained in the opinion.

S. F. HALE, for the appellant:

When a father-in-law places slaves, or other property, in the possession of his daughter after marriage, the presumption of law is, that she takes the absolute title without limitation or restriction, unless there is some declaration at the time limiting or restricting her estate (Olds v. Powell, 7 Ala. 655; Merriwether v. Eames, 17 *ib.* 330); and if the property passes absolutely to the wife, *eo instanti*, it vests in the husband.

We insist, that a separate estate in a married woman, which a court of law will recognize, must be created by will, or deed, or some declaration in writing, and cannot be created by a mere verbal declaration. But if the court should determine that such a separate estate may be created by a verbal declaration, then we insist, that the evidence does not show that such an estate was created in this case. The law favors the marital rights of the husband; and in order to create a separate estate in the wife, the husband's rights must be clearly excluded by the language used in the instrument: there must have been not only an intention, on the part of the donor, to create a separate estate, but the language used by him in passing the title must be such as, in law, will exclude the rights of the husband; and whether the language be written or verbal, the court must deduce the intention from the words used, and pronounce upon their sufficiency, in law, to create a separate estate. In order that the court may pass upon the legal sufficiency of the words used, the witnesses must inform

the court what the language was; but, in this case, the witness Blocker swears that he does not remember one word used or employed by the donor: he remembers no declaration, either to himself or wife, at the time the slave went into his possession. But unless some declaration was used, at or about the time, excluding the rights of the husband, the property immediately vested in him. What words were employed by the donor, is a question of fact for the jury; but the legal effect of the language used, is a question of law for the court; and how can the court pronounce upon its legal effect, when it is wholly uninformed as to what language was used, or that any language was in fact used?—Pollard v. Merrill, 15 Ala. 173, and cases there cited; Frierson v. Frierson, 21 *ib.* 555; Hill on Trustees, pp. 420–59; Burnett v. Branch Bank, 22 Ala. 642, which shows that a witness cannot swear to a legal conclusion, but must prove the language used, and let the court pronounce upon the legal question.

The character of the estate is fixed at the time the title passes from the donor; and unless the marital rights of the husband are then excluded, by the use of appropriate language, settling the property on the wife for her separate use, it vests at once in the husband, and no subsequent acts, declarations, opinions, or conclusions, either of the donor or the husband, can divest the rights of the husband, in favor of the wife, or vest such a title in her as will sustain an action at law; and therefore all testimony in relation to such subsequent acts, declarations, or conclusions, is inadmissible, and only calculated to mislead the jury.—Machen v. Machen, 15 Ala. 376; Frierson v. Frierson, 21 *ib.* 555; Dunn & Wife v. Branch Bank, 2 *ib.* 155.

The charge of the court, in effect, assumes that all that is necessary to create a separate estate in a married woman, is for a witness to swear that the donor consented that it should be done and intended to do it, and subsequently admitted that she had a separate estate in the property; when the witness expressly swears that he does not remember one word uttered by the donor in giving such consent, expressing such intention, or making such admission; nor does he tell one act done by the donor to effectuate his purpose. This, we insist, is directly adverse to the authorities above cited.

A married woman cannot acquire the legal title to property during coverture: therefore, the legal title to the slave in suit never vested in Mrs. Blocker during her life, and her administrator cannot succeed to any greater or other right than she had at the time of her death. In an action of detinue, the plaintiff must show a legal title to the property in himself; and if defendant shows an outstanding title in a third person, that will defeat the action.—McCurry v. Hooper, 12 Ala. 823.

The defendant in this case was not a wrong-doer: he holds as an innocent purchaser, for valuable consideration, without notice, from one who was in possession under claim of title.

R. H. Smith and J. D. Webb, *contra*:

There were but three possibilities of state of title to the slaves: it was either in William Murphy, Sr., in John R. Blocker, or in John R. Blocker as trustee. The defendant claims from the former, and yet does not pretend that the title was in him, but admits that it was not, and insists that it was in Blocker in his own right, with whom defendant in nowise connects himself, and who is constantly denying that he ever had any right. The defendant's stand-point, then, is not that he has title, but that a third person has.

Neither is it pretended that defendant claims from Murphy as an innocent purchaser. For, first, W. M. Murphy was present when Horner, Blocker & Co. were making their assignment, and then heard his father admit that the property was Mrs. Blocker's to her sole and separate use; and Jennings, who claims from William M., was a son-in-law, and has only a quit-claim. He is, therefore, a purchaser with notice, or, at least, without protection. Wm. M. Murphy had notice again by the recital of the fact in his father's first will, which he drew. The admissions, being antecedent to their date of claim, and antecedent to the mortgage, are good evidence to prove the facts. Secondly, it is not proved that William M. Murphy, or Jennings, was a purchaser for a valuable consideration. But, even if they were, it would avail nothing; for, at the date of the mortgage, and from that time up to shortly before suit brought, there was no personal representative of Mrs. Blocker in existence, against whom an adverse right

could spring up. The separate estate was not required to be recorded. The possession of Wm. Murphy, Sr., was that of his daughter, and was as consistent with the title as it could be, there being no personal representative in existence.—There was no possession, with claim or color of title, against any one, until Mrs. Blocker's administrator was appointed.

It is apparent, then, that the defendant has not a favorable standing in court: he is defending on the ground that another (not himself) has the title, while that person is disclaiming any such right, and insisting that the right is with the plaintiff.

As to the fact of the separate estate: It is proved that the gift was to the separate use of the wife, and this is not controverted; and if it was not, the subsequent election of the parties so to treat it, at a time when the rights of neither creditors nor purchasers had intervened, would make it such. Fellows, Wadsworth & Co. v. Tann, 9 Ala. 1003, and many other decisions of this court. But it is objected, that a separate estate cannot be created by parol. Why not? It contravenes no statute of frauds, and there is no statute of registration opposed to it.—Newman v. James, 12 Ala. 29. It has been frequently held by this court, that a deed creating a separate estate is not required to be recorded. A parol gift of personal property, accompanied by delivery, is good. Then why not a gift to one person for another? No reason has been urged against it, nor has any principle of law been cited in conflict with it. That it may be done, see Hill on Trustees, pp. 59, 60; 2 Kelly 297; 1 Geo. Dec. 109; 1 Bail. Ch. 510; 2 U. S. Eq. Dig., p. 610, § 21; *ib.* p. 25, § 446; 3 Call 384; McQueen on H. and W., p. 292–3.

The objection that particular words are necessary to create a separate estate, is untenable: it is sufficient that the intention appear, and this does abundantly appear from Blocker's testimony. The property was so sent and so received, and the parties so subsequently recognized it: and that at a time when the defendant is bound by such assent, viz., before his rights, or the rights of those from whom he claims, arose. 12 Ala. 31, *supra*. The law raised a trusteeship in the husband during the coverture, in order that the gift might not fail. On the death of the wife, the trust became executed, and the property went to her personal representative.—Knight

v. Bell, 22 Ala. 199, 205; 19 Ala. 747; Puryear v. Puryear, 16 Ala. 491; 12 Ala. 13; Trippe v. John, 15 Ala. 117; 9 Johns. 73. It did not go to the husband.—Randall v. Shrader, 20 Ala. R. 338; 2 Rawle 215; 3 Cowen 651; 1 Sugden on Powers, ch. 3, § 6; 2 *ib.* p. 456, and note.

The above views show the admissibility of the evidence, without the necessity of noticing specially the parts excepted to. It is not required, in order to give a party's admissions in evidence, that the witness should remember the very language used; for this would exclude all admissions: the substance of what was said, is all that is required, and all that can be given. In this case, all the court inquires is, does the language plainly indicate an intention to give, first, not to Blocker, but, secondly, to his wife. If it was given, not to Blocker, but to his wife, then it follows that it was to her separate use.

CHILTON, C. J.—This was an action of detinue, commenced by Robert Leachman, who was succeeded by Davis, the appellee, as administrator of Mrs. Blocker, to recover certain slaves, claimed to be the property of the estate of the intestate. Plea: *non detinet.*

The proof, as disclosed by a bill of exceptions, was, that Mrs. Blocker, who was the daughter of William Murphy, was married to John R. Blocker on the 11th of February, 1835, and removed with her husband to Mobile; that early in the summer of that year, her father gave her the negro woman, who, with her subsequent issue, is now the subject of controversy. John R. Blocker, the husband, testified that said slave was not given to him, but that he requested his father-in-law to secure the property to his wife, Mrs. Blocker, to which he assented, and the negro was then placed in their possession, and remained until the death of the wife, which happened in August, 1837, when she was taken as a nurse for the decedent's little daughter by the husband, to the house of the donor, with the child; that said J. R. Blocker was a member of the firm of Horner, Blocker & Co., of Mobile, which failed in December, 1836, and the firm assets, and the property of the individual members thereof, were assigned to Gayle & Vandergraff for the payment of debts; that the

slave in controversy was not assigned, but in preparing a schedule of his property, the witness had an interview with the donor, who was one of the preferred creditors in the deed of assignment, who concurred with him in the conclusion, that the right of the slave was not in him, but in his wife.—Neither the assignees, nor any one else, claimed any title to her. He also proved, that the girl, in the fall of 1850, was in possession of the defendant, Jennings, and her value; that his wife was allowed to select this servant from a number of slaves which Maj. Inge had for sale, but he does not know whether any bill of sale was made of her to any one; that he exercised over her such control as a husband usually exercises over the servant-maid of the wife. Witness' impression was, that at the time of the gift the donor inserted a clause in his will setting forth the fact that the girl was given to the sole and separate use of his wife; that this will was afterwards cancelled, and a new one made on the 17th of September, 1837; he remembers no declaration or language of Judge Murphy, in relation to the title of the slave, made at the time, or immediately before the transfer, addressed either to himself or wife; that William M. Murphy was present at the interview had between the witness and Judge Murphy, at the time of the assignment above spoken of; does not remember the language used by Judge Murphy, but is positive that they concurred in the fact that the slave belonged to his wife, and not the witness.

The defendant moved to exclude from the jury what this witness said respecting the title to the slave, as conceded by Judge Murphy and himself, when the assignment was made; but the court held that it was legal. He also moved to exclude what the witness said in respect to mentioning the fact of the gift in the will, upon the ground that such proof was irrelevant, and could not affect the title to the slave; but this motion also was rejected; and these rulings of the court, being assigned for error, present the first question for our decision.

It is unnecessary for us to determine whether a separate estate can be created in a married woman by verbal gift, although we confess we cannot well see why it could not, since no writing is required by our law to pass the title to a slave. Be this however as it may, it is too clear to admit of doubt,

that Judge Murphy intended to give the slave to his daughter, and we may concede that, without more, the title would have vested in the husband; but we have repeatedly determined, that in order to vest the title in the husband, he must have reduced it into possession as husband during the coverture.—He may repudiate all claim as husband to property given to the wife, and elect to treat it as hers, and hold or control it as her trustee; and if this election is made before the right or title is vested in him, and the coverture is determined while it is so held, his marital rights cannot be asserted afterwards to it; these rights remain as they were at the time of the dissolution of the marriage by death. In such case, the property vests absolutely, in law, in the wife, if she be the survivor, and in her administrator or personal representative if she be the party who first dies.

Whether, as against a creditor of the husband, property given to the wife, without expressions in the gift limiting it to her sole and separate use, could be exonerated from liability, by reason of his refusal to accept the gift as husband, and electing to hold the property as belonging to the wife, is not the question now presented. No creditor of Blocker is complaining; but one who, according to the testimony of William M. Murphy, was a derivative purchaser from the donor, under a mortgage executed near five years after the consummation of the gift to the wife. Claiming to derive a title through the mortgage of Judge Murphy, made on the 10th day of January, 1840, as deposed to by William M. Murphy, it is very clear that the declarations of the person through whom the defendant claims, made before his alleged purchase, in disparagement of his own title, are legal testimony.

The same reasoning is applicable to the clause inserted in the will. Of course it could have no efficacy as a muniment of title; but as a declaration of the grantor, reciting the existence of a fact then fresh in his mind, it is evidence. It will be observed, that the objection was not that the will should have been produced, or its loss proved, in order to warrant this secondary evidence. The objection was as to its relevancy. It tended to show a gift, and being made *at the time of the gift*, and as connected with it, it would be admissible upon the other ground of being part of the *res gestæ*.

The evidence presents this case: By agreement between the son-in-law and the father-in-law, the latter gives a slave to his daughter, to be held as her property by the husband, who does so hold it, consenting that it shall be hers; thus holding it as hers, she dies; the slave is placed by the husband with his infant child, as its nurse, in the family of the donor, who, notwithstanding the gift to the daughter, and his acknowledgments, first in his proposed will, and again when taking a lien in which he was preferred by the son-in-law's assignment, and leaving out this property upon the express ground that she did not belong to his debtor, the son-in-law, but to his wife, the daughter of the donor, makes a mortgage, and embraces her in it; this mortgage is purchased by one cognizant of all the facts, who, without foreclosure, sells by quit-claim to defendant; and the charge of the court presents the question, as predicated upon these facts, whether the administrator of the daughter has the right to the slave as against the subsequent holder under the donor's mortgage; the husband now deposing that he has not, and never set up, any claim to the slave, except as belonging to the wife as her separate property. The court charged, that, if the jury believed the evidence, which shows these facts, their verdict should be for the administrator of the wife; and in our opinion, the charge was right. The intention clearly was, to vest in the deceased a separate estate, and although, for want of apt language to effect that object, the husband, or his creditors, might, *at law*, have defeated that intention, yet, as the husband acquiesced in it, and did what, under the proof in this case, equity would have required him to do, namely, held the property not as his own, but for her, it is not for the defendant, who must be charged with a knowledge of the facts, to set up a claim for the husband, and thus defeat the intention, by making the husband the unwilling subject of iniquity for its protection. The husband requested that the property should be given to the wife, and not to him. He received it, and held it, as hers; he excluded it from his assignment, because it was hers, by the concurrence, too, of the very person from whom the defendant deduces his supposed title; and now, since her death, he still insists and swears that it was hers and not his; and since, by her death, the trust is executed, and her repre-

sentative can take and hold the legal title, what right has a third party to intervene, and, without connecting himself in any way with the supposed title of the husband, compel him to violate his conscience, and the principles of equity, by holding as owner, and not as trustee? If the title had vested in him, it is certainly true, that, in a court of law, he could not, either by his declarations, or by a positive conveyance, have vested it in the wife during the coverture. But in this case it never vested in him *as husband*. He pretermitted that relation, and expressly waived his marital rights, by receiving and holding it as the separate estate of his wife. This he had the right to do, as against all persons who cannot in any way connect themselves with his marital rights to enforce them against his will.

This view renders it unnecessary that we examine any other question raised in the argument of counsel.

Let the judgment be affirmed.

DICKINSON AND WINN *vs.* ANY.

1. The assignee of a title bond, who is notified at the time the transfer is made that one of the tracts of land embraced in the bond has been previously sold to another, and who afterwards takes to himself a conveyance for the entire tract, will be held in equity a trustee of the legal title for the benefit of the prior purchaser.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. JAMES B. CLARK.

COOK & VANHOOSE, for the appellants.

WM. S. EARNEST, *contra*.

LIGON, J.—The complainant in the court below, George Any, filed his bill against the appellants and one Hocut. The bill charges, that the appellee purchased of Hocut a tract of land, which is particularly described, and received from him

a bond for title when the purchase money should be paid; that at the time of the sale to him, Hocut did not have the legal title to the land sold, but held the title bond of one Trawick, for this and two other tracts of forty acres each, on which partial payment had been made. This bond was transferred by Hocut to Dickinson and Winn, to whom he was indebted; but at the time of said transfer, Hocut notified them, that the tract of land specified in the bill belonged to the complainant, and that he assigned the bond of Trawick to them only as to the two other tracts. It is averred that they received the assignment with this notice, and with the distinct understanding that it conveyed to them only Hocut's interest in the two tracts to which the complainant had no claim. The bill further avers, that Trawick has made a fee simple title to Dickinson and Winn for all the lands described in the bond, including that bought by the complainant, and that complainant has paid to Hocut the full amount of the purchase money; that he has requested the defendants Dickinson and Winn to convey to him according to the terms of the condition of Hocut's bond, but they refuse to do so.

There was a demurrer to the bill, which was overruled; and on the whole case a decree was made in favor of the complainant. The rulings of the chancellor on the demurrer, and in the final decree, are here assigned for error.

The bill makes out a clear case for relief, and there is no ground whatever for the demurrer. Dickinson and Winn are the trustees of the legal title to the land in controversy, for the benefit of Any, who has a perfect equity of which they had notice when they took the assignment of the title bond from Hocut, and the conveyance from Trawick. The *naked* legal title is in them, but they have no right to withhold it from him who has the perfect equity, and whose equity was fully known to them before they accepted that title. They are his trustees, and must be made to convey to him, when they refuse to do so on request.

The proof fully sustains the allegations of the bill, and it only remains to add that the decree of the chancellor is in all things affirmed, at the cost of Dickinson and Winn.

GOULD *vs.* HAYS, ET AL.

1. On the taking of an account before a master in chancery, to ascertain the compensation to which an executor is entitled, a witness cannot be asked, after the pleadings and depositions in the cause have been read in his hearing, "to state, from his own knowledge, and the facts disclosed by the pleadings and evidence, what would be a reasonable compensation to the executor."
2. Compensation, when applied to trustees, means but little (if anything) more than a liberal indemnity. As a general rule, in making allowances to executors, whether under the act of 1841, or without reference to that act, the court should look to the loss of time, trouble, risk and responsibility which are demanded by the nature of the trust, and actually incurred, and allow such a remuneration as a prudent and just man would, under such circumstances, consider a fair compensation, without, however, being governed by the business charges usually made for the like services.

APPEAL from the Chancery Court of Greene.
Heard before the Hon. E. D. TOWNES.

THIS bill was filed by the children of George Hays, deceased, against William P. Gould, his executor; seeking an account of the trust, and charging the executor with gross negligence and mismanagement in regard to it. At the June term, 1851, the decree of the former chancellor was reversed, and the cause remanded for further proceedings in accordance with the principles then laid down.—See 19 Ala. 438. A reference to the master of the matters of account was afterwards awarded in the court below, and the case now comes back on appeal from the decision of the chancellor, on the points presented by exceptions to the master's report.

S. F. HALE and F. S. LYON, for the appellant:

The only question now presented in this cause, is, as to the amount of compensation to be awarded to the executor for his services. His right to reasonable and just compensation has already been settled by this court.—Gould v. Hays *et al.*, 19 Ala. 438. Under the decision remanding the cause, and the decree of the chancellor directing the master to take evi-

dence and report a reasonable and just allowance to the executor for his services, the plaintiff in error insists the rules of evidence have been violated and disregarded, and manifest injustice done him. In taking the account the master ruled, that no witness could be allowed to testify as to the quantum of compensation, except upon his personal knowledge of "the amount of labor performed by the executor, the responsibility involved, and the value of the estate"; that no inspection of the bond of the executor, and the inventory and appraisement of the estate, showing the extent and value of the property managed, would authorize a witness to say what would be a reasonable and just compensation.

Let the case be tested by this rigid rule, and how does it stand? Only nine of the witnesses whose testimony was before the master came within his rule: Thomas Cauffield, Henry Cauffield, Madison Johnson, N. G. Friend, R. Ridgeway, Joseph W. Hall and Caswell Eady, for plaintiff in error, and John C. Johnson, for defendant, testified from their own knowledge of the facts; they were of the neighborhood, acquainted with the business attended to by the executor, and had a knoweldge of the "labor performed by him, the responsibility involved, and the value of the estate"; they were equally credible, and had an equal opportunity of knowing the facts; the average of their testimony established an annual compensation of $1786. The evidence of the eight witnesses first named, established an annual compensation of $1,857 50; the evidence of the one last named established an annual compensation of $1166. The master, in his report to which exception was taken, allowed an average annual amount of $1,170 27, in the form of commissions for the first three years, and an annual salary afterwards. The inquiry then presents itself, under what rule did the master attain his conclusion? Not from the testimony of any of the witnesses, because from that a different result is shown. Had he, then, a right to depart from the testimony, and act upon his supposed private knowledge of facts? The law says not. A master, in taking an account, cannot act upon facts in his own knowledge.—Bissell v. Bozman, 2 Dev. Eq. 229. The rules of evidence are the same in courts of equity as in courts of law.—2 Dan. Ch. Pr., 1031, note 1; 2 Bibb 5; *ib.* 28;

17 Mass. 303; 4 Monroe 20; 1 Johns. Ch. 425. All circumstances being equal, as to the knowledge and standing of witnesses, the preponderance of numbers is entitled to the advantage.—Part 1, Cowen & Hill's Notes; 1 Stark. Ev. 465. Upon the mere question then, as to the weight of testimony, the master's report would be set aside.

This court can, without remanding the cause, or causing the account to be referred back to the master, settle the true amount of compensation to the executor, upon the evidence reported. Upon this point, see Davis v. Roberts, 1 Smedes & Marshall 543.

Where, in an inquiry before the master on a matter of account, several witnesses are examined and give different estimates as to value or price, and he can make no discrimination among them, either as to their integrity, intelligence or opportunities of knowledge, or judgment, he may safely assume as his guide an average of their different estimates.—Morrison v. McLeod, 2 Ired. Eq. 108.

JOHN W. WOMACK and N. HARRIS, *contra*:

In determining the compensation to be allowed to an executor, regard must be had to the nature and extent of the estate, the duties which he is required to perform, the manner in which he has discharged them, and the result of his management to the estate. In this case, the appellant acted as executor nearly six years; the estate consisted of a large body of lands, embracing two plantations in this State and other lands in Mississippi, and about one hundred and sixty negroes; one of these plantations was situated about one mile from the appellant's residence, and the other about three miles; and the record nowhere shows that he ever went to Mississippi on account of the lands there situated. The estate was a large one, bnt it was not of that character which required extraordinary services from the executor, nor even his absence from home. The duties required of him were, to exercise such superintendence over the plantations and slaves as would make them most valuable to the appellees,—to see that fit and proper persons were employed as overseers; that the slaves were provided with suitable houses, food, and clothing; and that the crops were gathered and sold, and

the proceeds applied to the payment of the expenses and other proper debts and charges against the estate. The record tends to show that he did not give the same care and attention to the plantations of the estate, that a prudent man would have given to his own: he seldom visited the plantations; he employed overseers at the highest rates; the condition of the cabins is proved to have been bad, and there was a scarcity of blankets; and by his management the estate lost $1826 by Toulmin.

To what compensation is an executor entitled, whose management has resulted so unprofitably to the estate? The appellees insist, that the register and chancellor allowed as high a rate of compensation as was justified either by the testimony in the case, or the result of the executor's management to the estate. The testimony of McAlpin and Fambro was entitled to more weight than that of any other witnesses, because they had both been engaged in the management of estates requiring much more care and attention than that of Hays, and were therefore better qualified to put a proper estimate upon the value of the appellant's services, and the amount of his compensation, than the other witnesses; and they estimate the executor's compensation at $2\frac{1}{2}$ per cent. on receipts, and the same on disbursements. But, even if the rate of compensation fixed by them should not be adopted, still the amount fixed by the court below was a fair average compensation as fixed by all the witnesses. The usual commissions allowed to executors are, $2\frac{1}{2}$ per cent. on the receipts, and the same on the disbursements; and this is deemed a sufficient compensation for their ordinary services (2 Lomax on Executors, p. 329, § 27); and it is only where extraordinary trouble has been imposed, and extraordinary risk incurred, that a higher rate has been allowed.—Fitzgerald v. Jones, 1 Munf. 156; Ashurst v. Ashurst, 13 Ala. 786; O'Neil v. Donnell, 9 *ib.* 737. But in this case, there is no evidence that the executor was put to any extraordinary trouble, or that he incurred any extraordinary risk.

GOLDTHWAITE, J.—This case comes here on appeal from the chancellor, confirming the report of the master, made in relation to the compensation to be allowed the appellant

as the executor of George Hays ; and the only questions presented arise on the action of the chancellor in overruling the exceptions taken to this report.

The appellant qualified as executor on the 22d Jan'y, 1839, and continued to act in that capacity until the 4th of January, 1845; and when this case was last before this court (19 Ala. 438), it was held, that the appellant was entitled to compensation as executor,—that for the services performed by him previously to the act of 1841 (Clay's Digest, 228, § 39) the amount was to be determined by the law then existing, and that after that period he was entitled to an annual sum under the act last referred to. The order of reference directed the master to allow such compensation to the appellant as he should deem reasonable and right for his services as executor during the three first years, by commissions on the receipts and disbursements made by him during those years ; and for the residue of the time which he had charge of the estate, such an annual compensation for his services as should be reasonable, having regard to the amount of labor performed, the responsibility incurred, and the value of the estate ; and by the terms of the order the register was authorized to examine witnesses to establish the extent of the services, as also to the value of the estate, or any other matter pertinent to the inquiry, and also to look to the written testimony in the case. A great number of witnesses were examined, and the register reported as the compensation of the appellant : for the year 1839, 15 per cent. on receipts and disbursements ; for the year 1840, 5 per cent. on the receipts and disbursements ; for the year 1841, 5 per cent. on the receipts, and $2\frac{1}{2}$ per cent. on the disbursements ; for the year 1842, an annual compensation of $1250 ; for the year 1843, $1000; for the year 1844, $1000.

On the taking of the account, and after certain of the witnesses had testified as to their knowledge of the value of the estate, and the services rendered by the executor, and after the pleadings in the cause had been read in their hearing, as also the depositions of certain other witnesses as to the value and management of the estate, they were asked by the appellant to state from their own knowledge, and the facts disclosed by the pleadings and evidence, what would be a rea-

sonable compensation to the executor; which question, being objected to, was ruled out by the master, and his action in this respect was made the ground of an exception to his report; which exception was overruled by the chancellor; and as we think correctly, for the reason that it called upon the witnesses to pronounce upon the facts disclosed by the pleadings and evidence in the cause. Conceding for argument's sake, that the opinion of the witnesses upon the facts established would have been evidence; still the question propounded rendered it necessary for the witnesses, before giving their opinion, to determine what facts were proved, thus devolving upon them an inquiry which the master alone could determine. In the shape in which it was put, the question was manifestly improper, and the objection to it was properly sustained.

The second exception to the report was based upon the question propounded to the witnesses Cox and Collins, which was objected to by the appellant; but we consider it unnecessary to notice this exception, for the reason, that in arriving at the conclusion we have attained as to the compensation allowed, we have excluded the testimony of these witnesses, which is not entitled to the slightest weight, as neither of them states any fact which could lead the mind to any definite or satisfactory conclusion as to the correctness of the opinion they give. Each of them expressly states that he knew nothing whatever as to the extent or the value of the services of the executor, nor does either of them appear to have any knowledge as to the management of the estate by him. Their opinion, therefore, as to the nature and extent of services of which they have no knowledge, is entitled to no consideration whatever.

The other exceptions attack the conclusions of the register upon the evidence, and present simply the question, as to whether the testimony in the cause, and that adduced before the register, proved that the appellant was entitled to a greater amount of compensation than was allowed.

The practice which has obtained in this State as to compensating executors and administrators, in cases which do not fall within the act of 1841, has been by a percentage on the receipts and disbursements; and the principle to be extracted

from the decisions which this court has made upon that subject, is, that there is no fixed or uniform rate or limit to this compensation, but that the amount varies according to the circumstances of each particular case.—Harris v. Martin, 9 Ala. 895; Magee v. Copperthwaite, 10 *ib.* 966; Ashurst v. Ashurst, 13 *ib.* 781. The services actually rendered, considered with reference to the amount of trouble and the loss of time, and whether they were required or proper to be performed in the management of the trust,—the responsibility involved, measured by the condition, character, and value of the estate, —may very properly enter into the question of compensation; but, as courts, in making allowances to trustees, do not proceed on the principle of specific compensation for services rendered, (Harris v. Martin, *supra*,) care should be taken in fixing the amount, that trusts of this character should not become money-making occupations; and such would be the inevitable result, if services rendered by trustees were to be estimated according to the rules obtaining between man and man when dealing with each other at arm's length. Compensation, when applied to trustees, means but little, if anything, more than a liberal indemnity. We should much prefer a fixed and definite standard, applicable to all cases, for the reason, that it would be less subject to abuse; but no such standard has been fixed by law, and the only principles we can lay down for the regulation of the compensation, are those which we consider deducible from the authorities to which we have referred. The court, in making the allowance, is to look to the loss of time, trouble, risk, and responsibility, which are demanded by the nature of the trust, and which is actually incurred, and to allow the trustee such a remuneration as a prudent and just man would, in view of these circumstances, consider a fair compensation, without, however, being governed by the business charges usually made for the like services; and the rule, as a general one, equally applies to all allowances made to executors, whether under the act of 1841, or without reference to that statute.

Having ascertained the principles which must govern the question under consideration, we deem it unnecessary to go into the evidence in detail. To do so would settle no legal question, and would be but a useless commentary upon the

facts. It is enough to say, that after a careful and thorough examination of the whole evidence as found in the record, except the testimony of the two witnesses before referred to, we are satisfied that the allowance made was, under the law as we have stated it, sufficient.

The decree is affirmed, the appellant paying the costs of this court.

SWINNEY & PALMER *vs.* DORMAN.

1. When defendant is offered as a witness (under the statute) to sustain his plea of usury, he is not confined in his testimony to the note on which the suit is founded, but may detail the history of the whole transaction,—beginning with the original usurious contract, showing the payments on cancelled notes, the taking of new notes for the balance, &c.
2. A general motion to exclude a party's answers to interrogatories exhibited to him under the statute, "on the ground that they are evasive, irresponsive, and contain improper matter," when some of them are full and correctly made, should be overruled.
3. When money is borrowed by two jointly, but for the benefit of one, and a joint note given by them, on which they are both sued, either one is a competent witness under the statute to prove usury.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. NAT. COOK.

ASSUMPSIT by Wiley Dorman against the appellants, on a joint and several promissory note for $578 18, dated the 28th December, 1849, and payable one day after date to said Dorman or bearer, for value received. The defendants pleaded usury, and several other pleas which it is unnecessary to notice. Interrogatories were exhibited to the plaintiff, on the affidavit of the defendant Swinney; and when the cause was called for trial, "before the parties had announced themselves ready, defendants moved to reject the plaintiff's answers to said interrogatories, on the ground that they were evasive, irresponsive, and contained improper matter, and for objections appearing on the face of said answers, and to require plaintiff

to answer over again ; which motion the court overruled, and held the answers to be a substantial compliance with the statute, and that irresponsive and irrelevant matter might be stricken out: to which ruling of the court the defendants excepted."

The defendants served the plaintiff with notice of the facts to which they proposed to swear, but the plaintiff declined to controvert their statement on oath. "On the trial, the defendants' counsel proposed to (put) Wm. W. Palmer, one of the defendants, on the stand, as a witness to prove the plea of usury ; but it being admitted that, although said Palmer was jointly bound with the other defendant, and had been jointly bound with him since the debt was first created, yet the debt was for money borrowed by and for the use and benefit of the other defendant (Swinney) alone, and that he received all the original consideration, and that said Palmer was merely security on the debt,—plaintiff objected to his being sworn as a witness ; which objection was sustained by the court, and the defendants excepted."

"The defendant Swinney, being then introduced as a witness to prove the usurious consideration of said note, testified, among other things, that said note was given to extend a debt evidenced by certain other notes, which he produced, and which had various credits endorsed on them. Defendants' counsel asked him, if there had been any payments made to plaintiff which were not endorsed on said notes ; to which question plaintiff objected, his objection was sustained, and the defendants excepted ; the court ruling, that, although defendant was a competent witness to prove that usurious interest was included in the note sued on, yet he was not a competent witness to prove payments on the original indebtedness for which the note in suit was given ; to which ruling of the court defendants excepted."

These rulings of the court are now assigned for error.

Richards & Falkner, for appellants:

Dorman's answers should have been rejected, and he should have been required to answer over, because his answers were irresponsive, evasive, indefinite, and not such as the questions propounded to him were calculated to elicit.—Clay's Digest,

p. 341, § 160 ; Saltmarsh v. Bower & Co., 22 Ala. R. 221 ; Pritchett v. Munroe, *ib.* 501 ; Lake v. Gilchrist, 7 *ib.* 955 ; Lady Ormond v. Hutchinson, 13 Vesey 53 ; Branch Bank v. Parker, 5 Ala. 731.

William W. Palmer, being a joint maker of the note with defendant Swinney, and a defendant to the suit, was a competent witness.—Clay's Digest, p. 590, § § 4, 5 ; Gray's Ex'r v. Brown, 22 Ala. 262, 273.

The statute above cited shows that the maker or makers, obligor or obligors, are competent to prove the usury ; and in proving this, where partial payments have been made, it is necessary, in determining the amount of usury, to prove the amounts of payments made ; and if the maker or obligor cannot do this, the objects of the statute, in most cases, will be defeated. Where a witness is made competent for one purpose, and is put on the stand, he is competent to prove all the facts necessary to establish the fact which he is competent to prove.—Palmer v. Severance, 8 Ala. 53, which is conclusive as to the right to prove the payments.

William W. Palmer has been one of the obligors all the time, was a party to the suit, was jointly liable with the other defendant, and was therefore a competent witness. In this respect, the case differs from that of Paul v. Meek, 6 Ala. R. 753, and is clearly distinguishable from it.—Jackson v. Jones, 13 Ala. 121, 127.

ALLISON & BARNES, *contra :*

Plaintiffs should have pointed out some specific objections to the answers to the interrogatories : the objections were too general and indefinite.—Wallis v. Rhea & Ross, 10 Ala. 451 ; Milton v. Rowland, 11 *ib.* 732, 738 ; Melton v. Troutman, 15 *ib.* 535.

The record shows that the action was instituted on the 18th of February, 1852, and that Palmer was not the borrower, nor a party to the contract : he was, therefore, an incompetent witness.—Clay's Digest, p. 590, § 5 ; Paul v. Meek, 6 Ala. 753 ; Jackson v. Jones, 13 *ib.* 121 ; Code, § 12.

Swinney was incompetent to make the proof desired, as shown by the record, because the facts desired to be proved by him were not stated in the statement of the facts offered

to be proved by him.—Clay's Digest, p. 590, § 5; Jackson v. Jones, *supra*.

The record ought to show the terms used in propounding the question to Swinney, to enable this court to say whether the question was legal or illegal.—Melton v. Troutman, 15 Ala. 535; Stone v. Stone, 1 *ib.* 582; *ib.* 517. If what was asked Swinney, as shown by the record, was the question objected to, then it was illegal.—1 Greenl. Ev. § 434.

CHILTON, C. J.—The circuit judge committed an error in refusing to allow the defendants, as a means of making out their plea of usury, to prove that payments had been made upon the notes which were cancelled when the note sued on was executed, these cancelled notes forming the consideration of the one in suit. The rule established by this court in Palmer v. Severance, 8 Ala. 53, allows the defendant, when offered as a witness to prove usury, to go on and prove any fact which tends to establish the usury. He is not confined to the note in suit, but may go behind it, and show other transactions connected with it; as that the original debt was for such a sum,—that so much was paid, and new notes given for the residue, and so trace the transactions down to the note declared on. Were the law otherwise, the statute, in many cases, would fail of its object. This was done in the case just cited; for the statement shows that the Circuit Court permitted the defendants "to prove the entire consideration, embracing payments made by them before their notes were given, which were but the renewal of other notes given for borrowed money;" and the correctness of this ruling was substantially affirmed by the decision of this court.—See, also, 6 Ala. 753; 13 *ib.* 127.

2. The defendants below moved to reject the answer of the plaintiff made to interrogatories exhibited to him under the statute. The grounds of the motion were, that the answers were evasive, irresponsive, and contained improper matter.—The objection, it will be observed, goes to the whole answer, and nothing specific is shown as a reason for holding all or any of the answers insufficient. We have often decided, in respect of depositions, that the court was not bound to regard vague and general objections, devolving upon it the duty of

sifting the whole deposition to ascertain what particular portions should be excluded. The counsel must specify the answers excepted to, and the particular ground of objection.—A motion to exclude the whole of the answers, when a portion of them are full and correctly made, should be overruled.

3. We are of opinion, that the court also erred in refusing to permit the defendant Palmer to prove the usury in the transaction. The bill of exceptions states, that he had been jointly bound with the other defendant for the debt since its first creation; that is, as we understand the bill of exceptions, Palmer was an original party with his co-defendant Swinney to the usurious transaction, and they both borrowed the money for the benefit of Swinney. The fact that as between the defendants themselves one occupies the relation of principal to the other, cannot prevent the other, when sued, from proving the usury under the statute. He is a party to the usurious bond or contract, and as such comes within the letter as well as the spirit of the statute.—Clay's Digest, p. 590, § 5. In the case of Paul v. Meek, 6 Ala. 753, the defendant was the *endorser*, and was held not to be a competent witness, as he was not a party to the original undertaking. The drawer of the bill, it was said, was, after being released, a competent witness; and the case was supposed not to fall within the mischief intended to be remedied by the statute. It is clear that that case does not at all conflict with the views here expressed. Here, two parties borrow money, or negotiate upon usury for the benefit of one. They are both parties to the contract, and competent to prove the usury under the statute.

Let the judgment be reversed, and the cause remanded.

HALL AND WIFE, ET AL., *vs.* WALLACE.

1. A plea in abatement of matters *de hors* the record is fatally defective on demurrer, if not verified by affidavit.
2. In trespass to try titles, the pendency of another action between the parties for the same premises is not good matter for a plea in abatement.
3. If the names of the sureties for the costs of the appeal are shown by the record, although not mentioned in the clerk's certificate, it is sufficient.

APPEAL from the Circuit Court of Shelby.

The record does not show the name of the presiding judge.

THIS action, which was commenced by summons and complaint, was brought to recover a certain tract of land, together with damages for its detention. The defendant pleaded in abatement the pendency of an action of trespass *vi et armis* for the recovery of the same land, and damages for the detention thereof, which was brought by the plaintiffs and others against him before the commencement of this suit, and was still pending. A demurrer was interposed to this plea, which was overruled; and judgment was thereupon rendered for the defendant, which is now assigned for error.

JOHN T. MORGAN, for the appellants, contended, 1st, that the plea was defective, because not verified by affidavit (1 Chit. Pl. 460, 462); 2d, that the action of trespass *vi et armis*, set up in the plea, is not trespass to try titles (Coulter v. Bell, 2 S. & P. 359); 3d, that if it were the same action, it is but a substitute for ejectment, in which the pendency of another action is no bar (Mitchell v. Robertson, 15 Ala. 412; Camp v. Forrest, 13 *ib.* 114); 4th, that the parties to the two actions must be precisely the same, when the plea is to the jurisdiction (3 Sum. 165; 2 Bail. 412; Com. Dig., "Abatement," H, p. 114.)

WHITE & PARSONS, *contra*, insisted that the appeal ought to be dismissed, because the clerk's certificate did not show that any security for costs had been given, nor the names of the sureties (Code, § 3041); that the form of the plea complies with the requirements of the Code (§ 2236); and that the

pendency of another action for the same cause is good matter for a plea in abatement (1 Chit. Pl. 454; 1 Saund. Pl. & Ev., m. p. 18; 1 Mon. 191.)

LIGON, J.—The demurrer was improperly overruled. The plea is in abatement for matters *de hors* the record of the case in which it is pleaded, and is not verified by the oath of the party pleading it. This is fatal on demurrer.—1 Chit. Pl. 460-62, 454.

It is also bad in substance. The action is trespass to try titles, and is subject to the same rules which govern in ejectment at common law.—Code, § 2209; Clay's Dig. 320, § 43-4-5. We have already held, upon the best authority, that neither party is concluded as to title by a verdict and judgment in ejectment; and if the plaintiff persist in repeating his action, after being frequently defeated, the successful defendant may resort to a court of equity for an injunction, and thus secure his quiet.—Adams on Eject. 294, 315-16; Bacon's Abridg. (Bouv. ed.) title Ejectment (1); Camp v. Forrest, 13 Ala. 114; Mitchell v. Robertson, 15 *ib.* 412. As a former judgment or recovery cannot be pleaded in bar to a subsequent suit between the same parties in the action of ejectment, it would seem to follow, that the pendency of another action between them, at the time the second suit is brought, will not be good in abatement.

The evil of repeated suits between the same parties, on the *same title*, is now partially remedied in this State by section 2219 of the Code, which makes the second verdict for the defendant in such cases conclusive against the plaintiff, as to the title thus twice put in issue. This section, however, does not apply to the present case.

The motion to dismiss the appeal cannot be sustained, since the names of the sureties for cost are shown in the record itself, although they are not mentioned in the clerk's certificate. This is sufficient.

Let the judgment of the court below be reversed, and the cause remanded.

JELKS *vs.* McRAE.

1. A slave's confession, made in the presence of his master and the plaintiff, that he has received from another slave stolen money belonging to plaintiff, involves no charge against his master, and calls for no reply from him; and therefore the master's silence cannot be construed into an admission on his part of any of the facts to which the confession related.
2. A promise by the master to pay stolen money received by his slave, which has not come to his own hands, is without consideration, and will not support an action.
3. The doctrine of estoppel *in pais* cannot be so extended as to allow a recovery on a promise of the master to pay stolen money received by his slave, (which created no legal obligation for want of a consideration,) merely because the plaintiff relied upon the promise, and therefore neglected to use proper means to recover his money.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. NAT. COOK.

ASSUMPSIT on the common money counts, by Marcellus B. Jelks against Dawson A. McRae; plea, the general issue. The bill of exceptions states, that "the proof showed that, in September, 1851, the plaintiff accused a certain slave belonging to defendant, named Bill, of having received $200 of money, which he said was lost by him, from the hands of another slave belonging to one Threadgill; that said Bill confessed that he had received the money; that he was a few days afterwards, in September, 1851, in the possession of plaintiff, but by what authority was not shown, and at that time, in the presence of plaintiff, defendant, and others, confessed that he had got the money as above stated; that defendant then and there authorized and requested plaintiff to whip the said slave upon his said confession, but the plaintiff declined so to do, and delivered the slave to defendant, and told him that he held him responsible for the money; that defendant received Bill, and (according to the testimony of three witnesses) promised to pay plaintiff the $200; but, on the contrary, another witness swore that defendant promised to pay the money if he was bound in law to do it. One of said three witnesses testified, also, that he had heard defendant say, a

day or two afterwards, that he would pay plaintiff the said sum of money. The witnesses testified, also, that in said conversations, and at the time of the above transactions, there was not the slightest suspicion, or evidence, that defendant knew anything about the money, or the finding or having it by said Bill, or where it was, or in whose possession it was. The only evidence of the fact that plaintiff had lost the money was his own declarations, and the confessions of said Bill that he had received it from Threadgill's slave, as above stated. It was proved, also, that immediately after the slave was returned to defendant, he caused him to be whipped, in part to make him disclose or deliver up the money, but the slave did neither,—the parties both being present at the time. There was no proof as to where the money was, or that there was any money, or that defendant had any knowledge or means of knowing anything of the transactions, except the above declarations of the plaintiff, and the confessions of the slave.

"Upon this proof, the court charged the jury as follows:

"1. That, if they believed from the proof that the defendant, at the time above stated, was wholly ignorant of the facts, and knew nothing except what was stated in his presence, as above specified, by the plaintiff and said slave, then the law would not imply that defendant admitted the facts to be as stated, merely because he did not deny them at the time; and in that case, the declarations of the plaintiff, and the confessions of the slave, if not admitted to be true by the defendant, could not be regarded as proving the consideration for the promise made by defendant to plaintiff to pay the $200.

"2. That, if they believed from the proof that the slave had got the money as he confessed, and yet the defendant had no knowledge of it, except from the confession,—had not received the money, and had no means of obtaining it, and never did get it,—in that case, there would be no consideration for the promise, and it would not be binding on defendant."

Plaintiff excepted to these charges, and asked the following:

"1. That, if the plaintiff, in 1851, returned Bill to the possession of the defendant, and at the same time said to him, in substance, I hold you responsible for the $200 of mine which Bill confesses he got, and thereupon defendant received Bill, and said to plaintiff, I will pay you the $200; and if, by this

promise, plaintiff was lulled into security, and induced to forbear taking all the steps to recover said money which he otherwise would have taken, and if in this way plaintiff was injured, to any extent whatever, by relying on said promise,—then the jury ought to find for plaintiff.

"2. That if defendant's said slave, about September, 1851, received $200 of plaintiff's money, and defendant knew that his slave had it in his possession, and, with such knowledge, and while the money was in the slave's possession, defendant promised plaintiff to pay the $200,—then, upon this state of facts, the said promise is valid and binding."

The court refused to give either one of these charges, and the plaintiff excepted to each refusal; and he now assigns for error the charges given and the refusals to charge as requested.

BELSER & RICE, for appellant:

The court must decide on the admissibility of evidence, but not on its weight, effect, or sufficiency. In this case, no question was raised as to the admissibility of the evidence; but after it had been admitted, the court, in effect, by its first charge, directed the jury to exclude it, provided they believed that the defendant was ignorant of the facts, and knew nothing except what was stated in his presence by the plaintiff and the slave. This charge is directly condemned by this court in DeGraffenreid v. Thomas, 14 Ala. 681. This charge is erroneous, not only because it referred to the jury a question as to the admissibility of evidence, but also because it invaded the province of the jury in declaring that the evidence therein alluded to, in the case therein supposed, "could not be regarded as proving the consideration for the promise made by defendant to plaintiff to pay the $200."

The second charge disregards the true relation between master and slave, and the obligations of the master arising out of that relation, and the effect of an express promise made under the circumstances disclosed by the record.—The Governor v. Daily, 14 Ala. Rep. 469; Jones v. Nirdlinger, 20 *ib.* 488. That charge asserts, that defendant's express promise "would not be binding," if he had no knowledge of the slave's having the money except from the slave's confession, although plaintiff relied upon such promise, and failed to use means to

get his money which, but for the promise, he would have used, and was thus injured. Such is the effect of the charge, when construed in connection with the evidence; for, without any regard to its injurious effects on plaintiff, the court declares that it "would not be binding."

The first charge asked and refused is certainly authorized by law and the evidence, and should have been given; and the second charge likewise. When one is charged with liability or responsibility for a specified sum, and does not merely remain silent, but speaks, and makes an express promise to pay it, the case is not merely a case of admission implied from silence, but is far stronger against him; and the charge of the court utterly disregarded this difference.—Watson v. Byers, 6 Ala. 393; Wheat v. Croom, 7 *ib.* 349. "When a claim is the subject of conversation, in the hearing of the party against whom the claim is made, and he takes any part in the conversation, the whole evidence must go to the jury."—Mattocks v. Lyman, 16 Verm. 119. The rule as to admissions implied from silence merely, is laid down in Spencer v. The State, 20 Ala. 24. The difference between a case of mere silence, and a case where the party is not silent but speaks, ought to be steadily observed, but was disregarded in this case.

HOOPER & DUNCAN, *contra*:

The master is not liable for the trespasses of his servant, when committed without his consent.—Cawthorn v. Deas, 2 Porter 276; Blackburn v. Baker, 1 Ala. 173. Even if the master should promise, he would not be liable, because there is no sufficient consideration; *ex nudo pacto non oritur actio.*

GOLDTHWAITE, J.—There was nothing in the first charge that was objectionable, as the confession made by the slave involved no charge against the defendant, and called for no reply from him. He was not, therefore, called upon to speak, and his silence furnished no ground to suppose he admitted any of the facts to which the confession related.—Spencer v. The State, 20 Ala. 24.

The second charge was, in effect, that if the slave had received from another slave the money lost by the plaintiff, and defendant had no knowledge of it unless from the confession,—had not received it, and had no means of obtaining it,—the

promise on his part to pay was without consideration; and this was nothing more than the assertion of the principle, that an owner is not bound to answer for the illegal and unauthorized acts of his slave. The promise, in such case, makes no difference, as there is no consideration to sustain it.—Cawthorn v. Deas, 2 Port. 276; Blackburn v. Baker, 1 Ala. 173; Kenan v. Holloway, 16 *ib.* 53.

Neither can either of the charges requested be sustained. The first asserts, as a legal proposition, that if the defendant promised to pay the money received by his slave, and by reason of this promise the plaintiff was induced to take no measures for its recovery, which he otherwise would have taken, then he was entitled to recover. We think there was no error in refusing to give this charge, for the reason, that no evidence whatever appears on the record that the plaintiff was induced by the promise not to take any steps for the recovery of his money; and although this was a negative, if the plaintiff based any right upon it, there should have been some evidence of it before the jury. For aught we know, the plaintiff may have done all that he could, as the record does not show the contrary, the bill of exceptions not purporting to set out all the testimony. But it was properly refused for another reason: the charge assumes, that, although the promise may have been void for want of a consideration, it was good if acted on by the other party. We have found no case, which carries the doctrine of admissions or *estoppels en pais* to this extent. Suppose a verbal promise was made to pay the debt of another, and thereby the creditor was induced to take no steps to recover it of the principal debtor until he became insolvent; would the promisor be concluded? We think no case has ever gone that far. The plaintiff must be presumed to know the law, and he should not have trusted to a promise which created no legal obligation.

The last charge was properly refused, because there was no evidence tending to show that, at the time the promise was made, the defendant knew that the slave had the money of the plaintiff in his possession. The confession was no evidence of the fact as against his master, and, as we have seen, no inference could be drawn from his silence.

Judgment affirmed.

LESTER *vs.* MAHAN.

1. Suspicion of fraud on the part of the defendant, coupled with gross inadequacy of price, and the pressure of pecuniary embarrassment on the part of complainant, is sufficient to induce a court of equity to rescind a contract of sale.
2. In this case the contract was rescinded, upon proof that the complainant, who was in embarrassed circumstances, (his property levied on, and about to be sold under execution,) sold his farm to defendant, received part of the price in cash, and for the residue accepted a deed from defendant to a tract of land lying in Georgia, which complainant had never seen, and which was not worth more than one half the amount at which it was estimated in the transaction.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

BILL FOR THE RESCISSION OF A CONTRACT. The material facts of the case will be readily understood from the opinion of the court. The chancellor decreed the relief prayed, and his decree is now assigned for error.

J. T. LEFTWICH, for the appellant, contended that the whole of complainant's testimony consisted of loose, idle declarations, carelessly and lightly made, which were entitled to no weight against the positive denials of the answer; that the evidence, at most, could raise but a bare suspicion, which was not sufficient to induce the court to set aside the contract; that complainant himself sought the contract; that he placed no reliance on defendant's representations as to the value of the land, because the latter said he had never seen it; and that defendant had no connection with the complainant's pecuniary embarrassments.

L. GRESHAM, B. J. WHATLEY, and WHITE & PARSONS, *contra:*

The record shows, in the trade made between the parties, that Lester practiced a fraud on Mahan, and this appears, 1st, in false representations of Lester as to the value of the Georgia lands; 2d, inadequacy of price paid to Mahan for

his land in Alabama; 3d, the act of Lester in taking an undue advantage of the necessitous condition of Mahan. The false statement of a material fact, by words, acts, or artifices, is an actual fraud, and a court of equity will set aside a contract, (induced by such false statement,) and declare it a nullity (Boney v. Hollingsworth, 23 Ala. 660; Read v. Walker, 18 *ib.* 323; Munroe v. Pritchett, 16 *ib.* 785; Tucker v. Woods, 12 Johns. 190); and it is immaterial whether the party making the false statement knew it to be false or not, if the trade was induced by such false statement.—Read v. Walker, 18 Ala. 323, and authorities there cited; Reese v. Wyman, 9 Geo. R. 430; 12 U. S. Digest, p. 225, § 83. Inadequacy of price *per se*, unless gross and unconscionable, as a general rule, will not set aside a sale, but when connected with other facts of a suspicious nature, the strongest presumption of fraud will be indulged.—Wormack v. Rogers, 9 Geo. R. 60. The answer of Lester being contradicted by the proof in a material point, as it is in reference to his having seen all his Georgia lands, it loses its force as evidence.

CHILTON, C. J.—The record presents the appellant as seeking to hold on to a tract of land, purchased at less than half its value, of a distressed neighbor, whose property was then shortly to be sold under execution, and to relieve which the sale was made. He was to pay enough to satisfy the execution in money, say $200, and for the remaining $500 gave a deed for certain parcels of land lying in the State of Georgia, estimated in the negotiation as worth that sum. These lands the appellee never saw, and knew nothing about them; consequently the estimate was placed upon them by the representations of Lester. These representations do not consist of bold or direct assertions as to value, quality or quantity, but seem to be of an evasive, adroit character, and so guarded that, while they evidently served to create false impressions in the mind of Mahan as to the value of the land, yet the appellant should escape the charge of having stated what was positively untrue. He had seen only a portion of the land, but it by no means follows that he was not apprised of the value of the whole. Many persons deal in lands who have never seen them:—they buy and sell upon the representation

of agents, or persons on whose judgment they may safely rely, and who have examined them. Nor is it at all probable, that a man would own several parcels of land, for any considerable length of time, without knowing something about their value; especially, if he had taken the trouble to examine in person one piece lying remote from his residence, might a reasonable inference be drawn that he had made inquiry, and obtained information, respecting the other tracts not supposed to lie very remote from the one examined. Experience proves that ordinarily prudent men usually take this precaution.

But he refers to the character of the timber, which he says is marked on the plat and grant of one piece, and from that he supposes the soil is of good quality. This he had mortgaged for $200 or more, "and redeemed it *at the same* sooner than let it go;" he did not believe it would command that sum at the time of the sale to Mahan however; and thus, while he evidently desires to make the impression that it was worth more than $200 when he redeemed it, he would avoid the effect of the representation by the subsequent qualification. Again; while he says he did not know its value, he protests that he would not thank a man to give him less than $500 for the lands offered in exchange; and after this assertion, the appellee said, "It's a trade."

Now we entirely agree with the chancellor, that in view of all the circumstances of the case, as shown by the bill, answer, and proof, the appellant ought not to be allowed the benefit of this bargain. He knew he was dealing with a man under the pressure of embarrassment—one ignorant, save as he informed him, of the value, quality, and location of the lands proposed to be given in exchange for his farm; and he seems to have measured his expressions with much adroitness, so as to inspire the appellee with confidence, and induce him to make the bargain under the belief that the Georgia land was well worth $500, and at the same time artfully to escape the responsibility of having directly mis-stated the facts. He evidently created the belief that it was worth $500; and had it been worth this sum, even then he would have obtained Mahan's land at a sacrifice. But it is not worth, according to the highest estimate, half that sum.

Conceding that the counsel for the appellants are right, in saying that the proof only raises a suspicion of fraud, this suspicion, coupled with the gross inadequacy of price, and the pressure of pecuniary embarrassment under which Mahan labored, is sufficient to induce a court of conscience to wrest from the appellant all gains from such a transaction.

Although inadequacy of price is not, of itself, in general, sufficient to avoid a contract, yet it has been held, that when coupled with weakness of mind, from whatever cause produced, *or with pecuniary distress*, or circumstances of fraud, it affords a proper subject of relief in equity.—McCormick v. Malin, 5 Blackf. 509.

It is well settled, that in the exercise of its jurisdiction as regards fraud, the court of chancery is not confined to the rules and principles acted upon by the courts of law. It goes farther—nay, sometimes, even contrary to the rules which obtain in the common-law courts, in suppressing fraud. In Garth v. Cotton, 3 Atk. Rep. 755, Lord Hardwicke, in reply to the objection that the law gave no remedy, said, "But this case depends on principles of equity ; that is, the point of fraud and collusion, which establishes the authority of this court, often contrary to and beyond the rules of law." See to same point, 1 Spence's Eq. Jurisp. 625. According to the rules of law, fraud must either be proved, or be apparent from the intrinsic nature of the transaction ; but in chancery, it may be presumed, or rather inferred, from the surrounding circumstances (1 Spence 625) ; i. e. it may be established in equity by presumptive evidence, which would not be deemed sufficient at law.—1 Story's Eq. § 190 ; 2 Vesey 155 ; 18 *ib.* 483.

So in Trunchard v. Manley, 2 P. Wms. 167, it was held, "that might be a fraud in equity which was not at law."—S. P. Fallager v. Clark, 18 Ves. 483.

Judge Story says : "Where the party, intentionally, or by design, misrepresents a material fact, *or produces a false impression*, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case, there is a positive fraud in the truest sense of the term : there is an evil act with an evil intent ;" "and," he adds, "the misrepresentation may be as well by deeds, or acts, as

by words; *by artifices to mislead*, as well as by positive assertions."—1 Eq. Juris. § 192; Laidlaw v. Organ, 2 Wheat. 195. The ground of defence set up by the appellant presents him in no favored light in a court of equity. It is, that both he and Mahan being ignorant of the value of the Georgia lands, and he believing they were worth $500, and obtaining an allowance of that sum for them, should be allowed to hold Mahan to the bargain, notwithstanding they were both entirely mistaken in the value. In other words, he seeks to shelter himself under the idea of an innocent mistake to hold Mahan to an unconscientious bargain. Having contributed to produce the mistake, by means savoring of artifice and deceit, good faith and honesty require that he should rectify it, and place his deluded vendee in *statu quo*. This the chancellor has done; his decree must, therefore, be affirmed.

SHAW *vs.* BEERS.

1. A recovery in an action for the hire of a horse, buggy and harness, is not a bar to another action to recover damages for injuries done to the buggy and harness while in the possession of the bailee.
2. When a case is submitted to the decision of the judge without the intervention of a jury, his judgment on the law of the case is revisable on appeal.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellant commenced two actions on the same day, before a justice of the peace, against the appellee, one to recover $50 for the hire of a horse, buggy and harness, and the other to recover $20 damages for injuries done to the buggy and harness while in defendant's possession; and both actions were removed by appeal into the Circuit Court. In the case for hire, the court had charged the jury, that if the defendant, with the assent of the plaintiff, had taken the horse and buggy for the purpose of trying them, in contemplation of purchasing

them, and nothing was agreed upon as to the length of time he should keep them on trial, it was defendant's duty to return them after a reasonable time for trial, and if he failed to do so, he would be liable for the hire of them so long afterwards as he kept them. The jury who tried that case returned into court, whilst the case for damages was on trial, with a verdict in favor of the plaintiff for $50. The testimony in the two cases was the same. The case for damages being tried without the intervention of a jury, the court was of opinion, that one action might have been brought which would have covered the whole amount of plaintiff's damages, and that he ought not therefore to recover in this action, and accordingly rendered judgment for the defendant; to which the plaintiff excepted, and which he now assigns for error.

WM. BOYLES, for the appellant.

P. HAMILTON, *contra*.

GOLDTHWAITE, J.—The bill of exceptions shows, that on the trial below, the judge held, that a recovery in an action for the hire of a horse, buggy and harness, was a bar to a recovery in the present suit, which was between the same parties to recover damages for injuries done to the buggy and harness while in the possession of the bailee. It is true, that where a claim is in its nature indivisible, it cannot be split up into different causes of action; and this rule applies to torts as well as contracts.—Abner v. Holt, 11 Ala. 574; O'Neal v. Brown, 21 *ib.* 482. But this is not the case here. The bailment, or hiring, is entirely distinct from the injury done to the thing bailed; so that the ruling of the court was, in effect, that a recovery in one action would operate to defeat another, where the subject-matter of the two actions was in no respect the same. We need not cite authority to show that this is error.

It is urged, however, for the appellee, that as the judge tried the facts of the case, his decision is not reversible. But this doctrine is confined to the action of the court as a trier of the facts as occupying only the position of a jury.—Mims v. Sturdevant, 23 Ala. 664. In the present case, the error was not an erroneous conclusion upon the facts in evidence,

but purely a mistake in relation to what the law was. It was precisely the same, in effect, as if he had charged the jury that the recovery for hire would defeat the appellant in his action for the injury.

Let the judgment be reversed, and the cause remanded.

BEVILLE *vs.* REESE.

1. When an action is brought by summons and complaint (under the Code) on a promissory note and an open account for work and labor done, it is error to render judgment final by default, for the aggregate amount of the sums claimed, without the intervention of a jury, or the execution of a writ of inquiry.

APPEAL from the Circuit Court of Greene.

The record does not show the name of the presiding judge.

N. HARRIS and J. W. WOMACK, assigned errors for the appellant.

L. W. COCKRELL, *contra.*

LIGON, J.—The proceedings in this case were by summons and complaint under the Code. The complainant claims of the defendant the sum of $62 24, due by promissory note on the first day of January, 1852, and the further sum of $17 50, for work and labor done, due by open account on the first day of January, 1853. The defendant entered no appearance in the court below, and judgment final by default was rendered against her, without the intervention of a jury, or the award and execution of a writ of inquiry. This was error, so far as the sum claimed on the account is concerned; for the non-appearance of the defendant does not admit the sum due on the account, nor dispense with the necessity of proving such indebtedness to the satisfaction of the jury.

Let the judgment be reversed, and the cause remanded.

RIVES *vs.* TOULMIN.

1. When an action at law is brought on a penal bond conditioned for the payment of money on the performance of a condition precedent, and the defendant files a bill to obtain a discovery as to the execution of the trust which constituted the condition, if the answer of the obligee discloses that the trust has not been fully executed, the court may enjoin the action at law, without compelling the obligor to account for the benefit received from the partial performance.
2. A court of equity has no power to change contracts fairly entered into, nor can it, unless under special circumstances, relieve against the consequences of the non-performance of a condition precedent.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. WADE KEYES.

THIS bill was filed by Theophilus L. Toulmin, the appellee, to enjoin an action at law, brought against him by the appellant, founded on a penal bond precisely similar to that which was the foundation of the suit in the case of Rives v. Baptiste, (*ante* p. 382,) and to obtain a discovery and account of the execution of the trust deed executed by said Magee. The chancellor decreed an injunction against the action at law, with leave to the defendant to apply for a dissolution; and his decree is now assigned for error.

E. S. DARGAN, for the appellant:

[For Mr. Dargan's argument on the main points in this case, viz., that the defendant should be held upon his covenants, at least to the extent of the part performed, (the condition being susceptible of division, and the part unperformed capable of complete compensation, and the defendant having received the consideration of the covenant,) and that the condition had been substantially performed,—see his brief, and authorities cited, in the case of Rives v. Baptiste, *ante* p. 382.]

The complainant comes into equity to enforce a trust, and to discover how the property has been disposed of; he does not by his bill insist on the non-performance of a condition precedent as a bar to his liability. The defendant shows that all the property has been disposed of according to the terms

of the deed, except the two slaves sold in New Orleans, and the complainant is credited with their full value. The complainant, then, has received the full benefit of the trust property, to obtain which he filed his bill; and, as he comes into equity, he must do equity. It is said that equity will sometimes relieve against the non-performance of a condition precedent, when the failure to perform can be fully compensated (2 Story's Eq. 742; 3 Edw. Ch. 348; 2 Bro. P. C. 430); but where a party comes into equity to seek the application of a trust fund to the payment of a debt for which he is liable, and obtains this in a full and substantial manner, there is no reason, or justice, in discharging him from the amount he equitably owes.

Suppose Rives, after suing Magee to insolvency, and taken possession of the property, had declined to proceed immediately with the sale: would not Toulmin have had the right to file his bill, and have the property sold under a decree of the court, to relieve him from his bond? and if the property had not brought enough at the master's sale to pay the whole debt, would the court then have ordered the bond to be cancelled? or would the decree have been against him for his proportion of the sum not paid? The latter, of course, would have been the decree, because the entire property had been appropriated according to equity, and there was still a balance. And in the case at bar, the entire value has been appropriated, and Toulmin is applying for equity; therefore he must do equity, and pay the sum for which he is equitably liable, otherwise he would have no right to come into this court.

R. H. Smith, *contra*:

The answer of the defendant in this case does not pretend (any more than the replication does in Baptiste's case) that Rives could not have obtained possession of the two slaves carried off by Magee, or that any reason existed for not selling them, or for suffering Magee to take them off; and the inference against the answer is such as was shown to be against the replication. The maxim invoked by the appellant—that he who seeks equity, must do equity—certainly does not mean that one must waive his contract, and con-

sider himself under a liability to pay when he is under none. What want of equity can there be in standing upon and enforcing a plain, fair contract? The case stands thus: Rives declares, by the act of suing, that he has executed the duty whereupon the right to sue depends; and the defendant is driven to seek a discovery in equity, where it appears that plaintiff has no right to sue, because he has not executed the trust, and therefore can state no account. Chancery would be doing justice by halfs, would be visiting the wrong of the plaintiff on the defendant, would be making a new contract when there was no ground even to reform the old, would be holding out relief and offering a reward to wilful disregard of duty and fair obligation, were it to permit the plaintiff to go on.

GOLDTHWAITE, J.—One of the conditions on which the liability of Toulmin depended, was the execution of the trust which devolved upon Rives under the deed.—Rives v. Toulmin, 19 Ala. 288; Rives v. Baptiste, at the present term. The object of the bill was, to obtain a discovery as to what property had been sold under the trust, and to force an account for the value of a portion as to which it was charged there had been an improper execution. The answer of Rives showed that the trust had not been executed as to two of the slaves, and thereupon a decree was rendered enjoining him from the prosecution of his suit at law, with leave to move for a dissolution of the injunction. As the suit on the bond could not be maintained until the execution of the trust, and as the discovery made by Rives showed that this had not been done, equity could go on and administer the appropriate relief, if within the ordinary exercise of its authority.—Story's Eq., § 71, and cases there cited.

It is urged on the part of the appellant, that as Toulmin in his bill does not insist on the non-performance of the condition as a bar to his liability, coming into equity to enforce the due execution of a trust, he is bound to do equity, and that this principle would require him to receive a credit for the full value of the property which has not been sold. But equity has no power to change contracts fairly entered into. It cannot, unless under special circumstances, relieve against

the consequences of the non-performance of a condition precedent.—Barnett v. Passumpsic Turnpike Co., 15 Verm. 757; Wells v. Smith, 2 Ed. Ch. 78; Bucks v. Jouitt, 3 Litt. 229. Upon the discovery that the act upon which the liability of the appellee depended had not been done, he had a right to demand that equity should afford him the proper relief, without the imposition of terms which would substitute a different condition in the place of one agreed upon by the parties, and thus change the nature of their contract in an essential particular.

Decree affirmed; the appellant paying the costs of this court.

BURDEN *vs.* STEIN.

1. Under the act of 1841 (Pamph. Acts, p. 5) giving the lessee of the "City Water-Works" of Mobile a writ of *ad quod damnum* to ascertain the damage caused to riparian proprietors by his diversion of the water from Three-Mile creek, the writ might be sued out as well after as before the erection of the water-works, and against any one or more of the riparian proprietors.
2. If the writ commands the sheriff to make his return thereon, with the proceedings had under it, "*within ten days from the date of the writ*," it is a sufficient compliance with the requisition of the statute that the jury shall be summoned to view the premises "*at a time not exceeding ten days from the issuing of the writ*," although it specifies no day for the summoning of the jury.
3. This act was designed not merely to give a remedy for the present injury sustained by the proprietor, but to settle and fix compensation adequate to the injury occasioned by the continuous diversion of the water. Therefore, if the writ commands the jury to ascertain the amount of damage which the defendant "sustains or may sustain," and the verdict is that he "sustains no damage," this is a substantial compliance with the statute.
4. If the defendant was present, and objected to the action of the jury "because he was not duly notified of the time when the jury was to assemble," his objection cannot avail, on error or appeal, unless he affirmatively shows that the notice given him was too short to enable him to prepare for the protection of his interest.
5. When a statute requires notice to be given, but does not specify the length of time, it will be construed to mean a reasonable time.
6. When the decision of a cause pending in the Probate Court is suspended, by consent of parties, until the opinion of the Supreme Court in another cause

therein pending between the same parties can be had, if a judgment is afterwards rendered in which it is recited that the opinion had been received, it will be intended, on error or appeal, that the decision of the probate judge was rendered in open court, in the presence of the parties or their counsel.

7. The effect of a decision under this act, when the verdict of the jury is that the defendant sustains no damage, is to vest in the lessee "the absolute right to the land, water, privilege, or right condemned by the jury"; and therefore it is not erroneous to render judgment that the lessee "is entitled to the use of the waters of said creek, for and during their continuance, without any compensation for damages therefor to said defendant."

8. The defendant in the writ can only be taxed, under the statute, with the costs of the appeal, and the attendance of witnesses; but if the court renders judgment against him for the costs of the whole proceeding, and he takes an appeal to the Supreme Court, the proper amendment will there be made at his costs.

APPEAL from the Court of Probate of Mobile.

K. B. SEWALL, for the appellant.

F. S. BLOUNT, *contra.*

(No briefs have come to the Reporter's hands.)

CHILTON, C. J.—This was a proceeding under the act of 25th December, 1841, (Pamph. Acts, pp. 5–6,) by Stein against Burden, to ascertain what amount of damage the latter had sustained by the withdrawal of water from Three-Mile creek in consequence of the erection of certain water-works for supplying the city of Mobile with water.

It is insisted by Burden's counsel, that Stein could not have the writ of *ad quod damnum* after he had erected his works, but that the act requires that he should have proceeded before, and then not against any single individual, but against all proprietors on Three-Mile creek to be affected thereby. The statute is expressed in somewhat awkward terms; but we are satisfied the construction contended for is not the correct one, and would fail entirely to meet the object and design of the Legislature in enacting it. The right to sue out the writ is given by the first section of the act to Stein, his executors, administrators, or assigns, "*as often as may be necessary during the continuance of the privileges granted in the act, to which this act is amendatory,*" &c., and clearly contemplates the right to the writ after the establishment of the works as well as before; otherwise, the terms "during the continuance of the privileges

granted in the act," would be expletive. Nor is it necessary to summon all the proprietors who may claim compensation for damages in one writ; if it were, Stein could have but one writ, while the statute says he may sue out such writ "as often as it may be necessary"; the meaning of which evidently is, as often as a claim for compensation shall be set up by the riparian proprietors.

But it is said the writ is not in conformity to the statute, because it specifies no time when the jury are to view the creek, &c., so as to ascertain the damage. The statute requires that the writ should command the sheriff to summon a jury of seven discreet freeholders of said county, to view the said premises, "*at a time* not exceeding ten days from the issuing of the writ aforesaid." The writ in the case before us requires him to summon the jury and Burden to meet on the same day, at, &c., that the sheriff charge and swear the jury, &c., and then proceeds: "and the judgment so made and sealed by the jurors aforesaid, together with this writ, you are commanded to return to the Court of Probate for said county *within ten days from the date of this writ.*" We do not think it was incumbent on the court to fix any particular day in the writ, but are of opinion it is sufficient that the sheriff was required to have the same executed and returned within ten days from the date of its issue. This was done, and is a good compliance with the act.

Again; it is objected that the writ requires the jury to say "what amount of damage said Burden sustains, or may sustain, by the withdrawal of the water, or otherwise, in consequence of the erection of said works, and for and during their continuance." The act declares, that "the jury shall ascertain what amount of damage the said proprietors may sustain by the withdrawal of water, or otherwise, in consequence of the erection of said works." The objection appears to be based upon the idea that there must be a literal conformity of the writ to the act; but we think a substantial compliance is all that is required. It must be so framed as to carry into effect the object of the enactment, and the scope of the jury's inquiry must be sufficiently extensive to embrace all the rights intended by the act to be protected. It was not designed by the enactment merely to give damage for the present injury the

party may sustain, but to settle and fix the compensation, which should be adequate to the injury occasioned by the continuous withdrawal of the water for the use of the city. The writ is more explicit than the act, yet it carries out the spirit and meaning of it, and the supposed departure but multiplies (if it be a departure) the chances of Burden for damages, as it looks not only to the present but to the future damage which the proprietor may sustain. It is clear, however, that it is no departure, and that the damage which the proprietor "*may sustain*" means the injury which has been occasioned in the deterioration of his property, or otherwise, by the permanent diversion of a portion of the water accustomed to flow in the creek; and when the jury say they find "he sustains no damage," it must be understood in reference to the works as they then existed, and the effect upon the property of Burden by their continuance. Any other construction, it occurs to us, would be hypercritical, and would sacrifice the manifest meaning and substance to the mere letter.

The objection that Burden was not duly summoned to meet the jury, cannot be allowed to prevail, because it appears that he was present, and it does not appear that the notice given him was too short. His objection, taken before the trial, was not that he had not sufficient time between the notice and the view of the jury to prepare to go into the investigation, but that he had not been "*duly* notified of the time when the jury were to assemble." If he had desired further time, or the notice given him was too short, to enable him to prepare for the protection of his interest, he should have made that the specific ground of his objection. The statute does not fix the length of time which must intervene between the notice and the view; this must, therefore, be construed to be a reasonable time; and what is reasonable depends upon the situation of the parties and the nature of the thing to be performed. It is not made affirmatively to appear that the time allowed in this case was unreasonable, and the maxim applies, "what does not appear does not exist."

Objection is taken to the time when, and the form in which, the judgment was rendered.

As to the time: It appears by the record, that the trial of the exceptions filed by Burden was had at a time when he had

notice, and that he appeared and was fully heard, and at the request and by the agreement of both the parties, the matter was postponed until the opinion of this court could be had in another case between the same parties, which was then pending here. Afterwards, on the 21st March, 1854, the judgment of the court was rendered, overruling the exceptions of Burden, and deciding that the verdict finding that he had sustained no damage be affirmed, inasmuch as the testimony taken before the Probate Court showed its correctness, and adjudging that said Stein was entitled to the use of the water from Three-Mile creek for his water-works, for and during their continuance, without any compensation for damages therefor; and, finally, adjudging the cost of the proceedings against Burden. The entry shows that the opinion of the Supreme Court had been duly certified and made known to the court.

We are unable to perceive any irregularity in the time at which the judgment was pronounced. According to the judge's entry, the event had occurred upon which the decision was to be pronounced, the receipt of the opinion of this court, and we must intend that his decision was pronounced in open court, in the presence of his attorneys and counsellors, by the judge.

That the judgment declares that Stein is entitled to the water for and during the continuance of his works, is not erroneous; for this is the effect of the finding according to the statute, which declares, "the decree shall vest absolute right in Stein to the land, water, privilege, or right, that shall have been condemned by the jury," &c.

That the Probate Court taxed the whole cost of the proceedings against Burden was clearly not in conformity to the act, which requires that the cost of the attendance of witnesses, as well as the cost of the appeal, shall be borne by the party against whom the judge shall decide. This, however, furnishes no ground for reversal of the judgment, but is matter for amendment and correction, and is ordered to be so amended in this court at the cost of the appellant.

We see no error in the record which can avail the appellant as ground of reversal, and the decree of the Probate Court is therefore affirmed.

VAN EPPES *vs.* THE COMM'RS' COURT OF MOBILE.

1. The hire of carriages, procured by the sheriff of Mobile, under the direction of the circuit judge, to convey the grand jurors to the county jail for the purpose of inspecting it, is no charge against the county, although the Commissioners' Court, for many years past, has been in the habit of allowing such items.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellant sued the appellee before a justice of the peace, for $18, the hire of carriages procured by the sheriff, under the direction of the circuit judge, while the court was in session, to convey the grand jurors to the county jail for the purpose of inspecting it. The justice rendered judgment for the plaintiff; but the defendant removed the case by *certiorari* to the Circuit Court, where the judgment of the justice was reversed, and the judgment of that court is now assigned for error.

E. S. DARGAN, for the appellant.

P. HAMILTON, *contra.*

CHILTON, C. J.—The county can be charged only with such expenses as are authorized by law; and unless there is some statute which authorized the judge of the Circuit Court to direct the sheriff to provide carriages to convey the grand jurors to the jail, for the purpose of inspecting it, the expense thus incurred cannot be recovered out of the county. We have been cited to no statute, and have been able to find none, which makes it thus chargeable. The grand jurors receive a per diem compensation, which is supposed to be adequate, and which must be considered as extending to all the services required of them by law. That the Commissioners' Court has allowed such items for many years past, serves to show, perhaps, a commendable liberality, but does not fix upon the county a liability where none otherwise exists by law.

The amount in this case is quite small, it is true; but to allow it would establish a precedent which might reach far beyond the case at bar, and tend to squander the public funds.

The Circuit Court did right in refusing to give judgment for it, and its judgment is affirmed.

PEARSALL, EXECUTOR &c., *vs.* McCARTNEY.

1. When a transcript is filed after the third day of the term, but before motion to affirm on certificate, the motion to affirm comes too late.

APPEAL from the Circuit Court of Morgan.

MOTION to affirm the judgment on certificate, because the record was not filed until after the third day of the term.

L. P. WALKER, for the motion.

SAMUEL F. RICE, *contra.*

CHILTON, C. J.—Section 3030 of the Code requires that the transcript, &c., must be filed with the clerk of this court on or before the third day of the term to which the appeal is taken; and in default thereof, the succeeding section (3031) provides for an affirmance on certificate, reserving to the court the power of reinstating the case upon good cause shown, &c.

The record in this case was filed before the motion for affirmance was made. The fourth day of the term, and each succeeding Thursday, have been set apart for motion days; and we are of opinion, that the practice which has hitherto obtained, of refusing to affirm on certificate unless the motion is made before the transcript is filed, is not inconsistent with the above sections of the Code, and should be adhered to.

Motion denied.

McCONICO, ADM'R, *vs.* CANNON, ADM'R.

1. A decree rendered by the Probate Court on the final settlement of an estate, distributing the share of a deceased distributee directly among his children, held erroneous, and reversed on appeal sued out by his administrator, who had been made a party to the decree, on petition, for the purpose of taking an appeal.

APPEAL from the Court of Probate of Choctaw.

COLEMAN & VARY, for the appellant.

GOLDTHWAITE, J.—The appellee was the administrator of Benjamim Mason, deceased, and Thomas Mason was one of the distributees. Thomas Mason having died while the estate was in process of administration, the Probate Court, instead of bringing his personal representative before it, rendered a decree, on final settlement, distributing his share directly among his chidren. After this decree had been rendered, the appellant, who was the administrator of said Thomas Mason, propounded his interest by petition, and was made a party to the decree; and he now brings his appeal therefrom to this court.

The appellant, having an interest in the distribution of the estate, was properly made a party to the decree for the purpose of taking an appeal (Lees v. Browning, 15 Ala. 495; Watson v. May, 8 *ib.* 177); and we have repeatedly held, that where a person entitled to distribution of an estate dies, it is error to proceed to a final settlement without his personal representative.—Boyett v. Kerr, 7 Ala.9; Reynolds v. Reynolds, 11 *ib.* 1023; Hall v. Andrews, 17 *ib.* 40. That the omission to have the necessary parties before the court on the final decree, may be taken advantage of in this court, though not made in the court below, see Gould v. Hayes, 19 Ala. 438; McMaken v. McMaken, 18 *ib.* 576.

Let the decree be reversed, and the cause remanded.

EARLE, ADM'R, *vs.* REID.

1. Plaintiff in detinue, having recovered only one of the slaves sued for, excepted to the rulings of the court against him, and took an appeal, but afterwards coerced satisfaction of the judgment; this fact having been brought to the knowledge of the appellate court by affidavits, he was required to make restitution by the next term of the court; and now, having failed to comply with this order, his appeal was dismissed.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. GEO. D. SHORTRIDGE.

MOTION to dismiss the appeal, and affirm the judgment, because the appellant had failed to comply with an order, made at the last term, directing him to make restitution of a slave which he had recovered under the judgment of the court below, before he could be heard to assign errors in that judgment.

WM. S. MUDD, for the motion, cited Hall v. Habrowski, 9 Ala. 278; Bradford v. Bush, 10 Ala. 274; McCreliss' Distributees v. Kinkle, 17 *ib.* 459; Knox v. Steele, 18 *ib.* 815; Tarleton v. Goldthwaite, 23 *ib.* 346.

E. W. PECK, *contra*, insisted, that the order made at the last term might be reconsidered, as the cause was still *in fieri;* that the motion to dismiss the appeal was addressed to the sound discretion of the court (Steele v. Knox, 18 Ala. 817), and should not be granted under the peculiar circumstances of the case; and that a judgment at law (particularly in the action of detinue, where the judgment is not *in solido*) is not necessarily an entire thing, which must be either affirmed or reversed in whole.—Dennison v. Collins, 1 Cowen 111; Smith v. Jansen, 8 Johns. 111; *ib.* 558; 15 *ib.* 195; 3 Mass. 270; 5 *ib.* 420; 13 *ib.* 195, 433; 7 Wend. 147; 5 Hill (N. Y.) 442; 4 Burr. 2021; Bac. Abr., "Error," M.

CHILTON, C. J.—The appellant brought detinue for several negro slaves; but recovered a judgment only for one.—He insists, that but for an erroneous ruling of the court be-

low, he should have recovered the whole number sued for. He appealed from the judgment, to the last term of this court, and notwithstanding the appeal, went on to coerce satisfaction of the judgment. This fact being made to appear by affidavits, we felt constrained, under our previous decisions, to order restitution to be made by the present term of this court, or, in case of failure, that the judgment should be affirmed, or the appeal dismissed.

It is now conceded that restitution has not been made, but it is insisted that having control over the previous order, which is *in fieri*, we should affirm the judgment as to the slave recovered, and proceed and examine the errors as to the other slaves, and reverse and remand as to them.

It is certainly true, that there are many cases where the appellate court may reverse a judgment in part, and affirm as to the residue; but we apprehend these are cases where the appellate court proceeds to correct the judgment of the inferior tribunal, and renders such judgment as that court should have rendered. This we frequently do. We have, however, seen no case, and we apprehend none can be found, where in a proceeding in the common-law court, a plaintiff in error has had a judgment affirmed for all that he has recovered in the cause below, and has procured a reversal of the judgment as to what he failed to recover, with an order remanding that portion of the cause for a subsequent trial. This would be to split up a cause, and render several judgments in one suit, for different portions of the property sued for. We know of no precedent, nor any rule of practice, which would sanction this. If the judgment is for one slave, when it should have been for several, it is erroneous; and in order to recover the whole number sued for, it must be reversed, that upon another trial the party may recover the proper judgment. But in this case the plaintiff has affirmed the correctness of the judgment, by going on to enforce its satisfaction; he fails to place his adversary in *statu quo* upon the requisition of this court; the consequence is, he cannot be heard to assign errors upon it.

Let the appeal be dismissed at the cost of the appellant.

KIRKLAND *vs.* OATES.

1. As to the distinction between severable and entire contracts.
2. A recovery cannot be had upon an entire contract for the building of a house, without averring and proving performance; but where the employer discharges the workman on discovering a violation of the contract on his part, telling him to make out his bill for the work done, and promising to pay it to get rid of him, and the workman accordingly presents his account and quits the service, this is a mutual rescission of the contract; and if the work is used by the employer, and is of any value to him, the workman may recover its value on a *quantum meruit*.
3. A charge must be construed with reference to the proof.
4. When the charge of the court assumes a fact as proved, it will be presumed, on error or appeal, that the evidence justified the assumption, unless the bill of exceptions shows that the evidence was conflicting, or left the fact in doubt: a statement that the evidence "tended to show" the fact, is not sufficient to put the court in error.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

ASSUMPSIT, on the common counts, for work and labor done, by Henry M. Oates against Perry Kirkland; pleas, *non assumpsit*, payment, set-off, and failure of consideration.

It appears from the bill of exceptions, that there was a special contract entered into between the parties, by which Oates agreed to build the dwelling-house according to the direction of Kirkland, but, after progressing to a considerable extent with the work, he had violated the contract, in the absence of Kirkland, in the matter of some cornice which he put up. Upon Kirkland's return, he asked Oates how much he charged for the cornice he had put up, and being informed as to the price, he then told Oates that he could do no more work for him. Shortly thereafter, the defendant asked Oates if he was going to quit, who replied, that he did not want to quit,—that he would rather stay and finish the work. The defendant then told him to make out his bill, and he would settle with him for the work he had done, or would pay him two dollars per day for the time he had wrought to get rid of him. The items of work and bill were thereupon made out,

and Kirkland refused to pay. It was proved that the defendant had used the work which the plaintiff had done, and proceeded to have the house completed by another without making any alterations in it. The evidence was conflicting, however, as to whether the defendant had derived a benefit from the plaintiff's labor.

Upon this evidence, the court, in substance, charged the jury, that if plaintiff, in defendant's absence, had knowingly and willfully violated the special contract, defendant had the right to discharge him, and he could recover nothing unless the defendant went on and used the work, and it was of any value to him, then he had the right to recover that value. The charge of the court is assigned for error.

GEO. W. GAYLE, with whom were MURPHY & BLEVINS, for the appellant :

There was an entire contract between the parties, which the plaintiff below grossly violated, and was dismissed. The court charged, that, if defendant used the work done on his house, he must pay for it. This was error.—Brumby v. Smith, 3 Ala. 123 ; Givhan v. Dailey, 4 *ib.* 336 ; Hawkins v. Gilbert, 19 *ib.* 54 ; Story on Cont., § § 11, 456 ; 1 McCord's R. 22.

N. HARRIS, with whom were EDWARDS & CONNELLY, *contra :*

The bill of exceptions, which does not set out all the evidence, shows that the defendant used the work done by the plaintiff, and there was also evidence that it was of some value to him ; that the plaintiff was discharged from the further performance of the work by the defendant, and that the latter then promised to pay him for the work done. This is not a case where the performance of the entire contract, on the part of the plaintiff, was a condition precedent to his right to recover ; and if such has been the original contract, it has been changed or rescinded, and a new contract made to pay for the work actually done as much as it was worth. The law is well settled, that a recovery may be had in such case for the value of the work done.—Hawkins v. Gilbert & Maddox, 19 Ala. 57 ; Merriwether v. Taylor, 15 *ib.* 735 ; Thomas & Trott v. Ellis & Co., 4 Ala. R. 108 ; Hayward v. Leonard, 7 Pick. 181 ; 2 Green. Ev., § 104.

CHILTON, C. J.—A severable contract is one the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side; whilst an entire contract is one the consideration of which is entire on both sides, requiring the complete fulfilment of the promise by either as a condition precedent to the fulfilment of any part of the promise by the other.—Story on Cont., § § 21, 22, (3d ed.)

In the case before us, the contract was manifestly entire, and Oates could not have recovered upon it without averring and proving a performance. If he violated the contract in a material part, the employer had the right to discharge him, and this would work the same result as if he had abandoned the work voluntarily before completion.

This principle the charge concedes to be correct; but the qualification asserts the further proposition, that if the employer went on and used the work done by the plaintiff, and it was of any value to him, the plaintiff had the right to recover that value.

We have often held, that the charge must be construed with reference to the proof on which it is based. Here the proof shows that the appellant told his workman, after he had discovered the violation of the contract, and before he had quit his employment, "Make out your bill, and I will settle with you for the work you have done, or pay you two dollars per day for the time you have worked, to get rid of you." The bill was accordingly made out, and tendered for payment, and the workman thereupon quit the appellant's service. We think it is too clear to admit of doubt, that this amounted to a waiver of the terms of the original contract by both parties;—by the appellant, because his proposal is inconsistent with its terms, contemplating a different mode of compensation for the work done, and a cessation of the service; and by the appellee, who accepts the proposal, and quits the service, having complied with that which was proposed for his performance, in making out his account. This was a waiver, by mutual consent, of the terms of the special contract.—Judge Story says: "If the work has, with the express assent, or the acquiescence, of the employer, been left incomplete, or the latter has knowingly dispensed with a perfect and skillful

performance of it, a full compensation for it may be recovered upon a *quantum meruit*."—Story on Bail., § 441 c, (5th ed.,) p. 461. Keeping in view this proof, as the predicate of the charge, and the law as applicable to it, we think the court very properly instructed the jury, "that if the defendant went on and used the work done by the plaintiff, and it was of any value to him, the plaintiff had the right to recover that value."

We have held that the acceptance and use of the work, although not done according to the terms of the special contract, entitles the workman to recover.—Merriwether, adm'r, v. Taylor, 15 Ala. 735; see, also, Hawkins v. Gilbert & Maddox, 19 Ala. 54. Whether this principle applies to improvements of a permanent, immovable character, erected on the land of another—whether, in other words, if the employer is either compelled to use the work as it is, or else to abandon his land on which it has been erected, any inference could be drawn from such use that he had dispensed with the original contract, or had acquiesced in the departure from it, is a question which the facts of this case do not call on us to decide. We may concede that the acceptance and use of the work, without more, would not justify such a presumption.—At the same time the charge is correct, because, referring it to the testimony, we find the use was preceded by an express promise to pay for the work. It cannot be doubted, we think, that under such a state of facts, the workman is entitled to recover so much as the work is reasonably worth to the employer.—Story on Bail., § 441 b.

That the charge must be referred to the proof, see Jones v. Davies, 2 Ala. 730; 12 *ib.* 604; Lockwood v. Nelson, 16 *ib.*; and that the court may charge upon the facts without hypothesis, when there is no conflict in the proof, and they are not disputed, is also well settled.—13 Ala. Rep. 713: 15 *ib.* 276. Furthermore, when the court assumes a fact as proved, we must intend that the evidence justified such assumption, unless there is something in the bill of exceptions to repel it. To hold otherwise, would be to presume the court committed an error, which cannot be *presumed*, but must be affirmatively shown. If the plaintiff in error desires to show that the court has invaded the province of the jury, by assuming facts

as proved, he should show by his bill of exceptions that the testimony was conflicting or left the fact in doubt. The statement that the evidence *tended* to show a fact, without showing that the fact was disputed, or that there was a conflict in the evidence, is not sufficient to put the court in error. There may be facts of such a character as not to be susceptible of direct proof; and to such the rule would not extend; the question, for example, whether a party was actuated by a fraudulent *intent* in making a transfer, &c.—Kastillo & Keho v. Thompson, 9 Ala. 937. But such is not the character of the fact here assumed. Conceding then the promise of payment to have been made as stated in the bill of exceptions, we are of opinion, that the court very properly told the jury that, if they found the employer used the work, and it was of value to him, he should be held responsible for such reasonable value.

Let the judgment be affirmed.

SIMPSON *vs.* TALBOT.

1. A person who kills an estray within twelve months after the straying, and appropriates it to his own use, is liable to the penalty given by the statute (Clay's Digest, p. 550, § 5) against "any person who shall take up or use an estray contrary to the meaning of the act."
2. When time is laid under a *videlicet*, the pleader is not required to prove it as alleged; and therefore, when the time of killing an estray is thus laid, although the time specified is within twelve months after the alleged straying, it is not a sufficient averment that it was within the twelve months.

APPEAL from the Circuit Court of Pike.
Tried before the Hon. JOHN GILL SHORTER.

WATTS, JUDGE & JACKSON, for the appellant.
BELSER & RICE, *contra*.

GOLDTHWAITE, J.—This action was brought by the appellant against the appellee to recover the penalty of one hundred dollars, under the statute relating to estrays (Clay's

Dig., 550, § 5). The animal strayed was a cow; and the first count in the declaration avers that the defendant, within twelve months after the straying, killed and appropriated the estray to his own use. The second count avers the straying to have been on the 5th of March, 1851, and that the defendant "*heretofore, to-wit, on the 15th day of October*, 1851," procured the killing, &c., but contains no direct allegation that the estray was killed within twelve months after the appraisement or straying. Each count of the declaration was demurred to; and the only question here arises upon the action of the court below in sustaining the demurrers.

The fifth section of the stray law (Clay's Dig., 550) gives the penalty sued for against any "person who shall take up or use an estray contrary to the meaning of the act," and must be held to include any kind of use or disposition which would defeat the general objects of the statute. One of the principal objects was, to secure the rights of the owner by preventing any use or disposition being made of his property, which would prevent his proving and reclaiming it within a year; which is especially provided for in section eleven (Clay's Dig., 551), by section four (*ib.* 550), which gives a penalty against any person who shall take the property out of the State, or trade, or sell the same, under twelve months; and by section six, which declares that the owner is not to be divested of his property until within twelve months after the appraisement. Any use or disposition of the property which defeats the rights of the owner in this respect, is contrary to the meaning of the act, and directly within the object and intention of the fifth section. The court, therefore, erred in sustaining the demurrer to the first count.

The second count was bad, for the reason that it does not appear with certainty that the killing was within twelve months after the appraisement. It is true, it is alleged that the straying was on the 5th of March, 1851, and that the killing was on the 15th of October, of that year; but the time of killing is laid under a *videlicet*, the object of which is, to inform the other party that the pleader does not intend to rely on the time as alleged, for the true time.—Green. Ev., 60; Howard v. Ingersoll, 23 Ala. 673. If there was an averment that the killing was within the year, its being laid

under a *videlicet* would be of no importance, as it would be controlled by the material allegation; but there is no such averment, and if the 15th of October is not the true time,—*non constat* but that the killing may have been more than twelve months after the appraisement.

For sustaining the demurrer to the first count, the judgment must be reversed, and the cause remanded.

KING & OWEN *vs.* McCANN.

1. When no *supersedeas* bond, nor security for the costs of the appeal, is given, the cause will be stricken from the docket on motion, although the clerk certifies that "no bond was required because all costs have been paid."

APPEAL from the Circuit Court of Talladega.

CHILTON, C. J.—Motion is made to strike this cause from the docket, because no bond was given for the appeal, nor security for cost. The clerk in his certificate says, "no bond was required because all costs have been paid."

The statute says, "No *appeal shall be taken* without giving bond to supersede the execution of the judgment or decree, unless the appellant give security for the costs of such appeal, to be approved by the clerk, register, or judge of probate; the names of such securities to be certified with the record," &c. This security is not for the costs which have accrued, as the clerk seems to have supposed, but for "the cost of the appeal." The statute is peremptory, that no appeal shall be taken without this security; and as there is no security in this case, there can be no valid appeal.—Code, § 3041.

Let the case be stricken from the docket.

PETTY *vs.* GAYLE.

1. When a slave, who is hired for one month, does not work the full term, no recovery can be had upon the contract, as it is entire.
2. Evidence of a particular usage to pay *pro rata* on a contract of hiring if the slave does not work the full term agreed on, cannot be received, since the usage, if proved, could not be recognized.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

GEORGE B. GAYLE, suing for the use of W. A. Williams, having recovered a judgment against George Petty, before a justice of the peace, for $13 12, the defendant took an appeal to the Circuit Court, where the plaintiff filed a statement claiming "$15 for negro hire." Both parties were examined as witnesses in the Circuit Court. The plaintiff testified, that he had hired the slave to the defendant for one month, at $15 per month; that he afterwards, before the expiration of the month, under the impression that the slave had worked out his month with Petty, hired him to one Reeder for a month, but was afterwards induced by Williams, for whose use the suit was brought, to send him back to finish his month with Petty. Williams testified, that he had presented to Petty Gayle's order for $15, which he accepted to be paid when the slave had completed his month; that the order was subsequently lost, and when he called on Petty for payment, the latter refused to pay, alleging that the slave had not worked one month; that he then induced Gayle to send the slave back to complete the term, which the latter did, and the slave returned and worked one day and a half, Petty claiming two days. The defendant testified, that he had hired the slave for the term of four months, at $15 per month, and would not have hired him at all for a less term; that the slave only worked twenty-three and three-fourths days, while twenty-six working days were always computed as a month; that the universal custom in Mobile was, to pay only for a full month of twenty-six working days, unless there was a special contract to the contrary. One Geyer, however, testified, that

the custom was, to collect hire, *pro rata*, for so much of the month as the slave serves. The court rendered judgment for the plaintiff for $13 $3, and this is assigned for error.

J. Y. Blocker, for the appellant, contended that the contract was entire, and therefore no recovery could be had for a partial performance.—Saund. Pl. & Ev. 126; 6 Term Rep. 320; 19 Johns. 337; 13 Verm. 268; 17 *ib.* 355; Parsons on Con., p. 522; 1 Stew. 29; 6 Ala. 83; 3 *ib.* 440, 676.

William Boyles, *contra*, contended that Petty had a special property in the negro during the entire month, and must bear the loss of his neglect or refusal to work; that Petty's acceptance of Gayle's order, in favor of Williams, before the money was due, bound him to pay it, without reference to the contract between him and Gayle; that the evidence established plaintiff's right to recover the full sum claimed, and defendant could not therefore complain that the court gave judgment for less.

GOLDTHWAITE, J.—As to the contract itself, the only difference between the witnesses who were examined was, as to the length of time of the hiring—whether it was for one month, or four months; but this is entirely an immaterial matter, as all the witnesses agree that the slave did not work one month. Whether the hiring was for one month, or four months, it was an entire contract, and must be governed by the rules of law applicable to that class of agreements. Neither is there any disagreement between the witnesses as to the fact, that, when a contract is made for the hire of a slave by the month, it means in Mobile, where this contract was made, that twenty-six days' work is to be done. Thus explained by the evidence, the contract, if for the shorter term, as testified to on the part of the plaintiff below, was, in legal effect, the same as if it had contained an express stipulation on the part of Gayle that the slave should work twenty-six days for Petty; and upon that contract, the latter could not have been compelled to pay anything, if the slave did not work the specified number of days; and as there is no room for doubt upon that point, the judgment became a question of law upon the facts, and should have been for the defendant.

We have said nothing as to the evidence of a usage in Mobile to pay *pro rata* in contracts of hire, where the slave fails to work the full time agreed on, for the reason that, if proved, it could not be recognized. A particular usage may be given in evidence to influence the construction of a contract, or to explain the sense in which words or terms are used; but when the contract is established, and is not governed by the commercial law, it is not allowable to change its character, and attach to it conditions in opposition to the established rules of law.—West v. Ball, 12 Ala. 340.

The ruling of the court was, in effect, that a partial performance of an entire contract would entitle the party to a *pro rata* compensation; this was error.—Perry v. Hewlett, 5 Port. 318.

The judgment must be reversed, and the cause remanded.

GLASSCOCK *vs.* SMITH.

1. Delivery by the surviving partner, of a note then assets of the firm, which had been endorsed in the name of the firm by the deceased partner in his lifetime, is not sufficient to pass the legal title to the purchaser.
2. An endorser who acquires a note after maturity takes it subject to all defences existing in favor of the maker as against the payee or other party for whose accommodation it was made.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. TURNER REAVIS.

ASSUMPSIT by William A. Smith against Alexander Glasscock, on a promissory note for $950 50, dated April 1, 1851, payable to the order of Monroe Donoho on the 15th February, 1852, payable and negotiable at the Bank of Mobile, endorsed by said Donoho to Fontaine & Dent, and by Fontaine & Dent to plaintiff. The defendant pleaded the general issue and two special pleas; to the last special plea the plaintiff demurred, and replied to the others, but the record nowhere

shows the action of the court on the demurrer. The facts set out in the special pleas were afterwards proved by the defendant on the trial, and may be thus briefly stated: The note sued on was made by the defendant for the accommodation of Fontaine & Dent, (which firm was composed of Benjamin B. Fontaine and Dennis Dent,) and was in the possession of said firm at the death of said Fontaine, who was the cashier of the firm and had the principal charge of its monetary affairs; the endorsement of the note, in the firm name of Fontaine & Dent, was in the handwriting of said Fontaine, but the note was delivered to plaintiff, for full value, by Dennis Dent, the surviving partner, after Fontaine's death, and after its maturity. A short time before said note was given, said Fontaine rendered to the defendant an account current of the firm of Fontaine & Dent against Fontaine & Glasscock, (which firm was composed of the defendant and a son of said Benjamin B. Fontaine,) showing a balance of about $7000 against said last named firm, which was at that time, as was known to said B. B. Fontaine, insolvent and in failing circumstances; and at the time he delivered said account current, said Fontaine promised defendant, that Fontaine & Dent would look to his co-partner (John T. Fontaine) for one half of the balance due them, if he (defendant) would pay the other half, said John T. being at that time individually insolvent, and defendant solvent; and thereupon defendant proceeded to pay, and before the transfer of said note as aforesaid had paid, at least one half of said balance due from Fontaine & Glasscock to Fontaine & Dent.

Upon this evidence the defendant asked the following charges:

"1. That, if the jury believe from the evidence that the note was made by defendant for the accommodation of Fontaine & Dent,—that Fontaine, in his lifetime, wrote the name of the firm across the back of it, but did not deliver it to any one,—that it was retained by the firm, and was the property of the firm at the death of Fontaine, and after his death, and after its maturity, was transferred to plaintiff by Dennis Dent, by delivery only, with no other endorsement than as aforesaid, then plaintiff has no such title to said note as will authorize a recovery by him in this action.

"2. That if they believed from the evidence that said note was made by the defendant for the accommodation of Fontaine & Dent, and was transferred to plaintiff after maturity,—that said Fontaine promised defendant, at the time said account current was rendered, that they would look to said John T. Fontaine for one half, if defendant would pay the other half,—that said firm of Fontaine & Glasscock was at that time insolvent, or in failing circumstances, and so known to said B. B. Fontaine, and that defendant, before the transfer of said note as aforesaid, had paid one half of said balance, then plaintiff could not recover in this action."

The court refused these charges, and the defendant excepted; and he now assign for error, 1st, *the sustaining of the demurrer;* and, 2d, the refusal to charge as requested.

E. W. Peck, for the appellant:

1. The delivery of the note by Dent, the surviving partner, was not sufficient to vest the legal title to it in the plaintiff, as it was not equivalent to an endorsement by Dent, who alone had the right to endorse after Fontaine's death, which dissolved the firm.—Story on Promissory Notes, p. 207, § 190; Sanford v. Mickles, 4 Johns. 224.

2. The note was made and endorsed for the accommodation of Fontaine & Dent, who gave no value for it, and consequently could have maintained no action on it against the appellant; and the appellee, having taken it after maturity, stands in no better condition.—Story on Promissory Notes, § 190, and cases cited in note 2; Sparrow v. Chisman, 9 Barn. & Cress. 241, or 17 E. C. L. R. 366; 2 Stark. 166, or 3 E. C. L. R. 296; 9 Pick. 265, 270; Whitehead v. Walker, 10 Mees. & Wels. 695; 14 Maine R. 449; 21 *ib.* 425.

3. The authorities above cited show that the first charge ought to have been given.

4. The second charge ought to have been given, because Fontaine, during the existence of the partnership, had the right to compromise or compound the debts of the firm.—Story on Partnership, p. 181, § 115, and cases there cited.

P. & J. L. Martin, *contra.*

CHILTON, C. J.—The record nowhere shows that the demurrer to the third plea was sustained, and if a resort to intendment could aid the appellee in sustaining the judgment, we should presume the demurrer was withdrawn or abandoned. But this done, the plea remains, and must be considered as tendering one of the issues which the record shows were tried by the jury. Then comes the proof, which conduces to support it, and the charge which was refused, as applicable to it, forcing upon us the same question presented by the plea and demurrer. In this posture of the case, we have no alternative but to come to the question,—Did the delivery by Dent, the survivor, of the note, then assets of the firm, which Fontaine before his death had endorsed in the name of the firm, vest the legal title in the plaintiff?

We are of opinion it did not. The death of Fontaine, *ipso facto*, dissolved the firm (Collyer on Partnership, § 113); and upon such dissolution, the surviving partner became tenant in common with the personal representative of the deceased partner, of all the movable stock and effects of the partnership, charged with the duty of so administering them as to reduce them to money, pay off the debts, and, having accomplished the purposes of the partnership, to turn over to the representative the share of the surplus to which the deceased, if living, would have been entitled. His duty is, to close and adjust the business and affairs of the partnership. He has no power to bind the firm by any new contract. He cannot endorse or transfer the partnership securities to third persons, or in any other way make his acts the acts of the partnership. In short, he can do no act, and make no disposition of the partnership effects, inconsistent with the primary duty devolved upon him of winding up the whole concerns of the partnership.—Story on Part. § 322, and cases cited in note 1; Lang's Heirs v. Waring, survivor, 17 Ala. 145; Sanford v. Mickels & Forman, 4 John. 224; *per* Lord Kenyon, in Abel v. Sutton, 3 Esp. Cases 111.

The attempted transfer, in this case, was in the name of the firm of Fontaine & Dent. The endorsement of that name by Fontaine, the note not having been negotiated before his death, was inoperative after that time, and the subsequent delivery of it, so endorsed, by Dent to the plaintiff, was equiv-

alent to a new endorsement by him in the firm name. If his delivery made the endorsement effectual to pass the title as the endorsement of the firm, it was effectual to bind the firm as endorsers, and thus a new obligation against the firm would be created by the survivor, which, we have seen, and all the books agree, he may not create.

The third plea, which denies for the reasons above stated the validity of the assignment, was good, and the demurrer to it should have been overruled.

The second charge is greatly confused by the introduction of irrelevant matter, but, stripped of that, it was clearly proper, and should have been given. The superaddition to it was calculated, however, to restrict and prejudice the party who asked it, and consequently formed no objection so far as the plaintiff was concerned. The charge was: "If the jury believed that the note sued on was made by defendant *for the accommodation of Fontaine & Dent,—that said note was transferred to the said plaintiff after maturity,*" &c. The charge might well have stopped here, and rested the defence upon the want of consideration; as the plaintiff, conceding the validity of the assignment, took the note after its maturity, and consequently took it subject to all defences existing in favor of the drawer or maker as against Fontaine & Dent.—Chitty on Bills, marg. p., 69, 70, and note 2 (10th Amer. from 9th Lon. ed.); Story on Bills, § 187, and authorities there cited.

We are not sufficiently certain to justify us in expressing an opinion upon it, that we comprehend the point attempted to be presented by introducing into the charge the state of the accounts between the firms of Fontaine & Dent and Fontaine & Glasscock, and the promise by B. B. Fontaine, of the first named firm, that if the appellant would pay half the indebtedness of his firm to Fontaine & Dent, they would look to his (Glasscock's) partner (Fontaine), son of B. B. Fontaine, for the other half, and the compliance on the part of Glasscock in paying his half. It is not easy to perceive what this indebtedness has to do with the case, as the proof shows no effort to make it the consideration for the demand sued on.

For the errors above noticed, let the judgment be reversed, and the cause remanded.

FRY *vs.* CARTER & HOWELL.

1. Warehouse-men may maintain *assumpsit* for cotton "shipped by them as warehouse-men only," and not delivered to the consignees, *provided* the contract was made with them personally.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. ANDREW B. MOORE.

GEO. W. GAYLE, for the appellant.

WM. M. MURPHY, *contra.*

GOLDTHWAITE, J.—The action was *assumpsit*, brought by the appellees against the appellant, as a common carrier, for failing to carry and deliver cotton according to contract, described in the declaration as having been made with them personally. The bill of exceptions states, that on the trial the plaintiffs proved "that nine bags of cotton, of a certain value, were shipped by them as warehouse-men, on a steamboat of which the defendant was captain, and were not delivered to the consignees in Mobile; that there was no proof that said cotton belonged to the plaintiffs individually, but the evidence proved that they held and shipped such cotton as warehouse-men only." Upon this evidence, the court was asked to charge, (1st) that the plaintiffs could not maintain their action, without proving the cotton belonged to them individually; and (2d) that if the cotton did not belong to the plaintiffs, they could not recover, without showing a recovery against them by the owners of it, and satisfaction of the judgment against them. The refusal to give these charges presents the legal questions to be determined by this court.

The general rule is, that when an agent makes a contract *as agent*, it is treated as the contract of his principal, and the latter only can sue or be sued upon it (Story on Agency, § 391, and cases there cited); but when an agent makes the contract, not as the representative of another, but in his own name, although it may be notorious that he is in fact acting for an

other, he is personally a party to the contract, and may sue in his own name, although he has no personal interest.—*Ib.*, § 392, and cases there cited. And this distinction applies to shippers of goods as well as every other class of agents.—*Ib.*, § 394. It follows, that the plaintiffs would have been entitled to recover upon the evidence as stated in the record, if the contract for the carriage and delivery of the cotton was made with them personally; and this being the case, before this court can determine that the court below erred, in refusing the first charge, it must see that no such proof was made. This the record does not show. The bill of exceptions, it is true, negatives the fact of any property in the cotton: it states that it was shipped by them as warehouse-men only, and they may have so made it; but it does not show that the names of the owners were disclosed, and *non constat* that the contract for its carriage may have been made with them personally, and if so, they could maintain an action for its breach.

What we have said renders it unnecessary to consider the second charge requested, as it is obvious, that if we are right in our conclusions, it was properly refused.

Judgment affirmed.

COMMISSIONERS' COURT OF RUSSELL *vs.* TARVER.

1. When the proceedings of the Commissioners' Court in the establishment of a road are removed by *certiorari* into the Circuit Court, and the commissioners brought *in invitum* before that tribunal, no costs are recoverable against them on a reversal of their judgment; but if they take an appeal from the Circuit to the Supreme Court, and give security for the costs as provided by the Code (§ 3041), they are responsible for the costs of the appeal if the judgment of the Circuit Court is affirmed.
2. An error in the imposition of costs, being amendable in the primary court, will be amended in the Supreme Court at the cost of the appellant.
3. The record of the Commissioners' Court must affirmatively show the jurisdiction of the court over the proposed road; a designation by number of the section, township and range through which the road runs, is not sufficient to show that it is within the county.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellee sued out a *certiorari* to remove into the Circuit Court certain proceedings had before the Commissioners' Court in the establishment of a road, which is described in the report of the jury as "commencing on the old Federal road, running through section 28, township 16, and range 29, through lands belonging to Sterling Bass and Turner Moreland, thence through Wm. D. Tarver's, commencing at the south-east corner of section 20, 16, 29, and running near a north line to said Bass' plantation." The Circuit Court reversed the proceedings of the Commissioners' Court, and rendered a judgment for costs against the commissioners, from which they have appealed to this court.

BELSER & RICE, for the appellant.

BAKER & LEWIS, *contra.*

CHILTON, C. J.—The Commissioners' Court of Roads and Revenue represent the public in the matter of their jurisdiction over roads, &c., and are supposed to have no personal interest, other than as members of the community, in the establishment of public and private ways. If any member of that court has a peculiar, personal interest, such member would be disqualified from taking part in the deliberations of the court in establishing such way. Representing the public alone, it is not proper that costs should be adjudged against them when brought to a revising tribunal *in invitum.* The Circuit Court should not, therefore, have awarded costs against the commissioners.

This, however, is a matter which is amendable, and the amendment would doubtless have been made by the court below, if the matter had been brought to the notice of the court. In such case, it is proper to make the amendment in this court, and not to reverse the judgment on account of it.

Aside from the matter of costs, the judgment of the Circuit Court was right. There is no evidence to show that the Commissioners' Court of Russell had any jurisdiction over the way proposed to be established; because the proceedings

no where show that the proposed way lies even in the State of Alabama. We may concede that the court will judicially take notice of the public government surveys; but there are many government surveys in which may be found "section 28, township 16, in range 29;" and without a more definite description, the court cannot judicially know which is intended. We have already decided, that nothing will be intended in favor of the jurisdiction of this court, and that everything necessary to sustain its jurisdiction must appear on the face of the record. It is manifest that, without the aid of intendment, the jurisdiction in this case is not made to appear.—See Commissioners' Court of Talladega v. Thompson, 15 Ala. 134; 18 *ib.* 694. It results, that the judgment of the Circuit Court must be corrected, so as to give no costs, and must be here affirmed.

We have considered the question of costs in this court, and are satisfied that, under the provisions of the Code, the appellants should properly be taxed with it. They were not brought here, as into the Circuit Court, unwillingly, but are themselves the actors, or appellants, having given bond securing the costs of the appeal, as provided by section 3041 of the Code, from which there is no statute exempting them.—The rights of the applicants for the way were not at all compromited by the decision, as they could have renewed their application; and if the commissioners were unwilling to repose upon the decision of the Circuit Court, and desired to make themselves parties as actors to revise and reverse the decision, there is no hardship in the rule requiring them to be responsible for the costs.

Let the judgment be corrected as above indicated, and affirmed, at the costs of the appellants.

HUGHES *vs.* YOUNG.

1. H. having purchased from D. "a claim on public land" for $50, and D. being indebted to P. in that amount due by open account, by mutual agreement between the three H. executed his note to P "in payment of" D.'s indebtedness: *Held*, that this was a sufficient consideration to support an action on the note by P. or his assignee.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

THIS action, which was commenced by summons and complaint, was founded on a promissory note for fifty dollars, executed by the defendant (Willis Hughes) on the 28th day of December, 1849, and payable to Benjamin Parmer by the first day of January, 1851. The defendant pleaded want of consideration. Verdict and judgment for plaintiff, under the charge of the court, which is now assigned for error.

JOHN COCHRAN, for the appellant, cited Duncan v. Hall, 9 Ala. 128, and Finn & Dulaney v. Barclay, 15 *ib.* 626.

J. L. PUGH, *contra.*

GOLDTHWAITE, J.—Hughes, the appellant, purchased from one Dunkin "a claim on public land," for which he was to pay him fifty dollars. Dunkin, being indebted to one Parmer by account, proposed to Hughes that he should execute his note for the amount to him, to which Hughes assented, and they went together to his house, and Hughes told Parmer that he was owing Dunkin fifty dollars for his claim on public lands, and had agreed to execute his note for that amount to him, instead of Dunkin, "*in payment*" of the indebtedness of the latter to him. Parmer assented, and Hughes executed his note payable to him. This was all the evidence, and it being admitted to be true, the court charged that the plaintiff, who was the assignee of Parmer, was entitled to recover. The only question here is as to the correctness of the charge.

We do not consider it necessary to decide whether the sale or transfer of a claim on public lands is a sufficient consideration to sustain the note; for, if it is not, we think the plaintiff was entitled to recover upon the evidence. Unquestionably, if one man borrow money *to pay* a gambling debt, it may be recovered, although it might be otherwise if the loan was made to gamble with; and the fact that the lender knew the purpose to which the money was to be applied in discharge of such a debt would not affect his right to recover. The same principle governs in the present case. Hughes says to Parmer, I will give you my note for fifty dollars which I owe Dunkin for a claim on public land, if you will receive it *in payment* of Dunkin's debt to you. Parmer does so receive it, and the consideration, as between them, thus becomes the payment of the debt of Dunkin, and not the claim on the land.—Jones v. Sevier, 1 Litt. 50. The consideration between Hughes and Parmer being good, the latter can recover, and his assignee has the same right.

It is supposed by the counsel for the appellant, that the case of Finn v. Barclay, 15 Ala. 626, militates against the view we have taken of the law: but the distinction between the two cases is obvious. There the note was illegal upon its face, and the holder received it as *collateral security*—he parted with nothing at the request of the maker, and consequently acquired no right independent of the note itself.

Judgment affirmed.

RIDDLE ET AL. *vs.* HANNA ET AL.

1. When an appeal is taken by "the solicitor of the complainants," some of whom were infants suing by their next friend, the appeal is not valid so far as the infants are concerned; but as to the adult complainants, the authority of their solicitor will be presumed.
2. A bond for security for the costs of an appeal is not necessary; a simple acknowledgment in writing is sufficient, unless the appeal is intended to operate as a *supersedeas*.
3. An appellant who has enforced and received satisfaction of the decree,

will not be allowed to assign errors, until he has done what is necessary to place the appellee in *statu quo*.

APPEAL from the Chancery Court of Benton.

Heard before the Hon. JAMES B. CLARK.

MOTION to dismiss the appeal, 1st, because it appears to have been taken by "the solicitors of the complainants," and not by the latter in their own proper persons; 2d, because no bond was given to secure the costs of the appeal; 3d, because a next friend for the infant complainants is not made a party to the appeal, nor is his name mentioned; and, 4th, because the adult complainants have enforced and received satisfaction of the decree.

J. B. MARTIN, for the motion.

WHITE & PARSONS, *contra*.

GOLDTHWAITE, J.—The record shows that some of the complainants in whose favor the decree was rendered were infants, and it also shows that the appeal was taken by "the solicitor of the complainants." It is true, that it appears the suit was prosecuted, so far as the minors were concerned, by their next friend; but that does not make him a party complainant: he is placed upon the record in order that the court may have some one before it, who is responsible for the conduct of the case and the costs. An infant cannot act by attorney in taking an appeal, which is in the nature of a new action, any more than in other legal proceedings.—Bradford v. Weeks, 1 Johns. Ch. 325. So far as they are concerned, the case stands here as if no appeal had been taken.

As to the appellants who are of full age, the certificate of the register is, in substance, that they came by their solicitor and applied for an appeal; and we will presume authority in their attorneys to act, precisely as we do in other legal proceedings. If there was no authority; the Code has made provision for the case in that aspect by sections 744 and 746.

In relation to security for costs, no bond is necessary. This is not the practice in cases in the Circuit Court where suits are commenced by non-residents. A simple acknowledgment in writing is all that is necessary, where the appeal is not intended to act as a *supersedeas*.

The dismissal of the appeal has been pressed upon us, on the ground that some of the appellants have received satisfaction of the decree. The rule established in Knox v. Steele, 18 Ala. 815, is, that when that is the case, the parties who have received satisfaction will not be allowed to assign errors until they have done what is necessary to place the other party in *statu quo*.

As the record shows that the decree was enforced on the petition of all the appellants who are of full age, and as they have received satisfaction, and as the appeal under the circumstances must be regarded as taken by them alone, before they can be permitted to proceed in this court, they must refund the money received by them; and if this be not done by the next term of the court, the appeal will be dismissed.

GOLDSMITH, FORCHEIMER & CO. *vs.* LANG.

1. An affidavit, made by a debtor in custody under bail process, "that he has no moneys, estate, or effects, real or personal, in possession or in expectancy, within the State of Alabama, *subject to levy and sale by execution*," without adding "*whereby to satisfy the debt*,"—was not sufficient to warrant his discharge under the act of 1839 (Clay's Digest, p. 71, § 3), but it is sufficient under the Code (§ 2182).
2. Proceedings instituted by a debtor (who was in custody under bail process sued out before the Code went into operation but was surrendered by his bail after that time,) to obtain his discharge, must conform to the provisions of the Code.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS was an action against a sheriff for an alleged escape, and was commenced by summons and complaint under the Code. The complaint alleges, that the plaintiffs, Goldsmith, Forcheimer & Co., commenced an action at law against one L. B. Acker on the 30th day of January, 1852, and at the same time sued out a bail writ against him, on the ground

that he had fraudulently conveyed his estate or effects; that said writ was placed in the hands of the then sheriff of Mobile, who arrested said Acker under and by virtue of it; that said Acker, on the same day, gave bond, in due course of law, with condition that, if cast in said suit, he should pay and satisfy the judgment of the court, or surrender his body in satisfaction thereof, or that his sureties in the bond should do the same for him; that such proceedings were afterwards had in said suit, that plaintiffs recovered a judgment against said Acker on the 17th day of November, 1852, upon which judgment an execution was issued, in due form of law, returnable to the next term of the court, commanding the arrest of the body of said Acker to satisfy said judgment; that this writ came to the hands of the defendant, James W. Lang, who was then the sheriff of Mobile, on the 20th day of December, 1852, and was by him returned "not found" on the 4th day of February, 1853; that said Acker was afterwards, to-wit, on the 4th day of April, 1853, surrendered into the custody of said defendant, as sheriff, in satisfaction of said judgment; and that said defendant afterwards suffered him to escape out of custody, without any legal right or authority for so doing.

The defendant pleaded, that said Acker, after his surrender as alleged in the complaint, to-wit, on the 29th day of April, 1853, made affidavit, before a justice of the peace, that the particular allegation sworn to by plaintiffs in order to hold him to bail, viz., that he had fraudulently conveyed his estate or effects, was untrue, and that he had no estate, moneys, or effects, real or personal, in possession or expectancy, within the State of Alabama, subject to levy or sale by execution, or anything in action, in his possession, or under his control, within said State, excepting articles which are exempt from levy and sale by law; that the plaintiffs had three days' notice of the time and place when, where, and before whom said affidavit would be made; that the justice of the peace before whom the application was made thereupon granted an order discharging said Acker from custody, under which order defendant discharged him, as he was by law bound to do. The affidavit and schedule made and filed by said Acker, which are made a part of the plea, are as follows:

"Affiant says, that he has no moneys, estate, or effects, real

or personal, in possession or in expectancy, within the State of Alabama, subject to levy and sale by execution, nor anything in action, in his possession, or under his control, in said State, excepting those articles which are exempt from levy and sale by law: and that he has not conveyed or concealed anything for his own use, or to defraud his creditors."

"L. B. Acker has no estate, moneys, or effects, of any kind, real or personal, in possession or expectancy, within the State of Alabama, subject to levy and sale by execution, and nothing in action, in his possession, or under his control, in said State; and for this reason he can file no schedule of his property."

The plaintiffs demurred to this plea, and specified the following causes of demurrer:

"1. That said plea is inconsistent on its face, in this: It states that said Acker, in the affidavit made by him before said justice of the peace, 'declared on oath that the particular allegation sworn to on behalf of the plaintiff in order to hold him to bail, to-wit, that he had fraudulently conveyed his estate or effects, was untrue;' and said plea sets forth said affidavit at length as a part of said plea, and there is no such allegation on oath in said affidavit.

"2. That said plea is double.

"3. That, in order to discharge said Acker with schedule, plaintiffs were entitled to ten days' notice of the time, place, and justice of the peace, when, where, and before whom said Acker was to appear; and make such schedule and affidavit.

"4. That said affidavit was insufficient to warrant the discharge of said Acker by said defendant in the suit complained of.

"5. That, if the affidavit itself were sufficient to warrant a discharge, such as the plea sets up, no such schedule is annexed as is required by the statute, but only an excuse why no schedule is made.

"6. Because the magistrate had no jurisdiction to order a discharge in the premises."

The court overruled the demurrer: and issue being then joined on the plea, the jury returned a verdict for the defendant. The overruling of the demurrer is the only error assigned.

JOHN T. TAYLOR, for the appellants:

Mr. Acker was arrested under the old law existing before the Code; and to discharge himself, he should have taken the oath required in Clay's Digest, page 71.—23 Ala. 668; 1 *ib.* 22; 10 *ib.* 237.

The affidavit is wholly insufficient as a controverting oath, under the second section of the said act. The act says, the defendant must swear, that he has neither "money, estate, or effects, whereby to satisfy the debt." The affidavit says, that he has no money, estate, &c., "in the State of Alabama, subject to levy and sale by execution." The act also requires the affidavit made by the plaintiff to be controverted, which this affidavit fails to do. He may have had money "whereby to satisfy the debt," although it might not be subject to "levy and sale."—1 Cranch 117; 2 Port. 410; 3 M. & W. 248; 4 Verm. 513.

Neither is this affidavit good under the third section of the act referred to. The oath provided by that section can only be taken when the defendant has some effects, and therefore he cannot take the controverting oath provided in the second section. Under this section, the defendant is required to file his schedule of effects. The oath required is not as comprehensive as that required by the second section, and the defendant cannot be allowed, when he has no effects at all, to escape the oath provided for his case in the second section, by taking that in the third; that would enable defendant to avoid both acts, as he has attempted to do in this case.

It is clear, however, that the affidavit was made in view of the provisions of the Code, which, we say, is wrong; but admitting this is right, then he has equally failed to comply with that act. By the Code, two classes of cases are provided for, as under the old law: one, where the defendant has no effects; and the other, where he has effects. In the first case, defendant must controvert the oath made by the plaintiff, which is here not done, and must also swear that he has no money, effects, &c., within the State of Alabama, to satisfy the debt. In this case, the defendant only swears that he has none "subject to levy and sale by execution." In the latter case provided by the act, the defendant "must file his schedule, setting forth the character, description, &c., of the effects,"

Now the defendant, in his affidavit, does not pretend to comply with this act: instead of affirming the requirements in his own affidavit, he says that he cannot comply because he has no effects. Then he should have taken the oath required by the first section, which was provided specially for his case. The oaths are very different, and he cannot protect himself under this last section, without complying fully with its requirements. As the creditor cannot arrest his debtor, except by a strict compliance with the statute; so the debtor cannot discharge himself, when arrested, except by a compliance with the terms of the act.—1 Paine 400.

A. R. MANNING, *contra:*

1. The law having given a judicial cognizance of the matter to the justice of the peace, his order of discharge, even though erroneous, cannot be disregarded by the sheriff, (a merely ministerial officer,) unless the order of the justice be suspended or restrained by a superior judicial tribunal.

2. And independent of the order, Acker was entitled to enlargement by his affidavit alone; and this either according to the Code, (§ 2182, clause 1,) or to Clay's Digest (p. 70-1, § 2.) The words "subject to levy and sale by execution," in Acker's affidavit, clearly mean *not exempt from execution;* or, that he he retained no property which he was not allowed by law to keep, as against his creditors. Property is "subject to levy and sale under execution," though the sheriff may not be able to find, or lawfully to reach it. If the affiant were prosecuted for perjury, it would be ridiculous for his attorney to argue in defence, that although his affidavit was false in the former sense, it was true in the latter. He swears, moreover, that he has not concealed anything for his own use, or to defraud his creditors; and that he has not anything in action, either in his possession or under his control, in the State; and in swearing that he "has not conveyed or concealed anything for his own use, or to defraud his creditors," he directly denies the particular fraud charged against him.

It was not contemplated or required by the law, as set forth in Clay's Digest, (70-71,) that the arrested debtor should account here to his creditors for what he might have in another State. If they wish to pursue such property, they must do so

in the State where it is (Croom v. Davis, 6 Ala.); and this is provided expressly in the Code (§ 2182); so that, according to either Clay's Digest or the Code, the affidavit is ample.

CHILTON, C. J.—The ground upon which Acker was held to bail was, that "he had fraudulently conveyed his estate or effects." The plea, to which, it is insisted by the appellants, the demurrer should have been sustained, avers that the said Acker, on oath in writing, before a justice of the peace, denied the particular allegation which was sworn to by the plaintiffs in order to hold him to bail, to-wit, that he had fraudulently conveyed his estate or effects. The affidavit, which is made a part of the plea, among other things, avers, that he, Acker, "has not conveyed or concealed anything for his own use, or to defraud his creditors." This, we think, substantially denies the ground upon which bail process was sued out; but the old law required the defendant to go farther, and swear "that he has neither estate, effects, or moneys, whereby to satisfy the debt, or liable for the same." This the affidavit fails to do, but merely avers that "he has no moneys, estate, or effects, real or personal, in possession or in expectancy, within the State of Alabama, *subject to levy and sale by execution.*" He should have added, "whereby to satisfy the debt"; for he may have money in his possession "not subject to levy and sale by execution," nor concealed, "whereby to satisfy the debt." The affidavit failing to negative this idea, it is insufficient, when considered with reference to the oath requiring a schedule to be rendered, as by the third section, Clay's Digest, p. 71. So that, under the old law, we think the discharge of Acker from custody was irregular.

But is such proceeding to be governed by the old law? We think not. The party is in custody in virtue of proceedings had under the old law. He must now resort to some remedy for his discharge. This remedy does not affect the bail bond, for it would not be competent for the Legislature to impair its obligation; at least, no question respecting it arises here, since it was discharged by the delivery of the principal to the sheriff. In obtaining his discharge, Acker must become the actor, and the plaintiffs in the judgment the defendants. Suppose he had sued out a *habeas corpus*; this, being a new pro-

ceeding, must be governed by the new law as enacted by the Code. Or suppose he had sued out an appeal, and entered into bond, thus superseding the judgment and process; here he would obtain his discharge, but by the new law.—23 Ala. 668. Now we can perceive no difference, in principle, between these cases and a resort to any other remedy to obtain his discharge which is in the nature of a new and distinct proceeding, in which the relation of the parties is changed, being reversed. This cannot be regarded as a continuous proceeding in the cause pending before the Code went into operation, but a new proceeding, as much so as an appeal, or *habeas corpus*.

We think it should be governed by the new law; and as it conforms to this, the discharge was valid, and the sheriff should be protected.—Code, § 2182. It follows, that the demurrer to the first plea was properly overruled.

Let the judgment be affirmed.

PULLIAM *vs.* OWEN & RUSSELL.

1. Although bills for the specific performance of contracts are addressed to the discretion of the court, yet this is not an arbitrary or capricious discretion, but one which is regulated, as nearly as may be, by general rules.
2. The vendor cannot, after he has received full payment of the purchase money, resist a specific performance of his contract, on the application of the vendee's assignee, on the ground that the vendee has committed trespasses on his other lands, and is insolvent.
3. Unliquidated damages, sounding in tort, are not the subject of a set-off, either at law or in equity.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

BILL FOR SPECIFIC PERFORMANCE. The complainant, Jas. Pulliam, alleges that, in September, 1845, Robert Owen, one of the defendants, sold to William Russell, who is also made a defendant to the bill, a tract of land containing twenty-eight acres, (being a part of section seven, in township nineteen,

and range twenty-five,) for the sum of $224; that the full amount of the purchase money was paid at the time of the sale, and said Owen, not having at that time obtained the legal title to the land, executed his bond for titles to said Russell, conditioned to make titles to the land so soon as he obtained it; that said Russell, in December, 1846, sold said land to complainant for the sum of $200, which complainant has long since paid, and endorsed Owen's said title bond to him; that complainant immediately went into possession of said land, and has erected valuable improvements thereon; that Owen has obtained the legal title to the land, and, instead of conveying to complainant according to the stipulations of his said bond, has instituted his action of trespass to try titles to recover possession from complainant. The prayer of the bill is for an injunction of said action at law, and for a specific performance of the contract.

Owen, in his answer, denies that the contract between himself and Russell is correctly stated in the bill, and gives the following as the true history of the transaction: Long before the date of said title bond, he and Russell had been partners in a distillery, and about the time of the formation of the partnership he had contracted to sell Russell one hundred acres of land in said section seven, at $8 per acre, amounting to $800, of which sum Russell had paid $400; said partnership was dissolved after the expiration of about two years, and the matters of account between the parties, including the said transaction in reference to the land, were referred to arbitration; the arbitrators ascertained on a settlement of the accounts, that Russell was indebted to Owen in the sum of $575 82, and submitted two propositions for the adjustment of this balance, viz., that Russell should keep said one hundred acres of land, and pay Owen said sum of $575 82 when the latter made titles thereto; or that Russell should give up the land, and that Owen would then owe him $224 18, for which he should execute his bond to make titles to twenty-eight acres, a portion of said one hundred acres, so soon as he could obtain the legal title, and that Russell should not trespass on Owen's other lands. The parties accepted the latter proposition, and Owen thereupon executed his said title bond to Russell for said twenty-eight acres of land, in

pursuance of said award. The answer further alleges, that it was the understanding of the parties at the time of said award that Russell should give up to Owen the possession of said entire tract, except said twenty-eight acres; that Russell has refused to comply with this stipulation, and has kept possession of the entire tract, and respondent, not having the legal title at that time, could not compel him to give it up; that Russell, in violation of the terms of said award, has committed trespasses on respondent's other lands, and destroyed timber exceeding in value the said tract of twenty-eight acres; that he is insolvent, and therefore unable to respond in damages; and that complainant, since his purchase from Russell, has continued to trespass on respondent's land, and to destroy his timber.

The award, which is made an exhibit to the answer, is as follows:

"We agree, that Robert Owen shall give to said Russell his bond or obligation to make titles to a certain piece or parcel of land," (here follows a description of said twenty-eight acre tract embraced in the title bond afterwards given by Owen,) "the said bond to be conditioned to make titles to said land so soon as titles can be obtained by Owen; and we further say, that Russell shall not trespass on the rest of the lands of Owen in his now enclosure, and that Russell is not to be interrupted in the possession of his place the present year."

The chancellor dismissed the bill, and his decree is now assigned for error.

N. W. Cocke and S. F. Rice, for appellant:

1. The award of the arbitrators contains *independent* stipulations, as to the acts to be performed by the respective parties. The execution of the bond was not dependent on the surrender of possession by Russell of the other lands; and as the bond is absolute, and contains no condition as to such surrender, the surrender cannot be treated as part of, or in any wise connected with, the contract to convey.

2. The discretionary power of a court of equity, to refuse a decree for a specific performance, will only be exercised, when some good reason therefor exists, which is a part of, or is connected with, the contract itself. This is to be collected from all the authorities.

3. A court of equity will not refuse a decree for a specific performance, unless it be a case in which a court of law can afford full compensation.—Phillips v. Berger, 8 Barb. Sup. Ct. 527; Malins v. Brown, 4 Conn. 403; 3 Cowen 446; 1 Smith's Lead. Cases in Equity, 581.

4. As to the acts of Russell: Pulliam is a purchaser for a valuable consideration, and has made valuable improvements, without notice of any ground of defence on the part of Owen. Rangeley v. Spring, 21 Maine 130.

5. The record shows that, as to Russell, Owen had a complete remedy at law, either by writ of forcible detainer or trespass, the moment (after the first January, 1846,) that he refused to surrender provision of any of the lands outside of the bond, and an action of trespass against Pulliam for any trespass committed by him.

GEO. W. GUNN, *contra:*

An application for the specific performance of a contract is an address to the sound discretion of the court, which withholds or grants relief according to the circumstances of each particular case; and in the exercise of such extraordinary jurisdiction, the court, though not exempt from general rules and principles of equity, acts with more freedom than when exercising its ordinary powers.—Tyson v. Watts, 1 Md. Ch. 13; 12 U. S. Dig. 227, §§ 112, 129. Specific performance is not a matter of absolute right, but of sound discretion in the court, (Waters v. Howard, 1 Md. Ch. 112,) the question being, not what the court must do, but what it may do under the circumstances.—Gould v. Womack, 2 Ala. R. 83. A specific performance will not be decreed when it would operate unjustly on the defendant.—Ellis v. Burden, 1 Ala. 459. Nor where the party who applies for it has omitted to execute his part of the contract.—Delage v. Hazzard, 16 Ala. 196. Nor in favor of an assignee, when new equities intervene, which are insisted on in bar of such performance.—McMorris v. Crawford, 15 Ala. 271. Complainant must show that he has been in no default, and that he has taken all proper steps towards performance; because, if guilty of gross laches, his bill will be dismissed.—2 Story's Equity, §§ 770, 771; Casey v. Holmes, 10 Ala. 777.

Such being the well-settled rules touching the specific per-

formance of contracts,—the complainant not having done equity, nor come into court with clean hands, but having, by virtue of his position, kept the vendor out of the use of lands which his contract required him to give up, and having also trespassed upon the lands of his vendor by cutting down and destroying his valuable timber in violation of the stipulations of his contract,—he is not entitled to the aid of a court of equity, and his bill was properly dismissed; more especially, since the very trespass complained of was provided against by the contract. The question is here presented, as Russell's contract was that he should not trespass upon Owen's lands, how can he possibly show performance on his part, after having violated the stipulations of his bargain; and the same doctrine is applicable to complainant Pulliam, who has committed the like trespass. Russell, in like manner, violated the terms of his contract in withholding from Owen the possession of seventy-five acres of land. As neither has specifically performed his part of the contract, they cannot ask a specific performance.

GOLDTHWAITE, J.—We agree with the chancellor, that the only consideration for the bond for titles, as shown by the record, was the indebtedness of Owen to Russell to the amount of $224; so that, regarding the purchase money as fully paid, the first question is, whether the conduct of Russell has been such as to entitle him to the assistance of the court, had he been the complainant. It is true, that all applications to compel a specific performance are addressed to the discretion of the court; but this is not an arbitrary or capricious discretion, but one which is regulated, as near as may be, by general rules.—White v. Damon, 7 Ves. 30. We have found no case where the contract was fair and reasonable, where a court of equity has gone entirely outside of the agreement to find a ground for refusing to interfere, unless it was to sustain an equitable set-off.—Lindsay v. Jackson, 2 Paige 582; Gay v. Gay, 10 *ib.* 377. We see great difficulty, if the chancellor, in withholding relief, is to institute an inquiry into the complainant's conduct in relation to the matters that have no connection with the contract sought to be enforced; and the authorities tend very strongly to show

that equity will not, in the exercise of its discretion, in applications for a specific performance, look to circumstances entirely independent of the agreement (Poole v. Shergold, 2 Brown's C. C. 118; Buckmaster v. Harrop, 7 Vesey 341; Croom v. Ledyard, 2 M. & K. 251); and in Byrd v. Odem, 9 Ala. 755, it was held, that a vendor could not resist the specific performance of his contract, by showing an indebtedness of the vendee to him, independent of his contract.—See, also, Seaman v. Van Rensselaer, 10 Barb. Sup. Ct. 81. In the case before us, Owen had, as we have seen, received the purchase money. It was paid by his indebtedness to the vendee, and the only reason why the arbitrators did not require him to make titles immediately, must have been because he had not then obtained the title from the government. He stands as the mere naked trustee for Russell, and unless he can hold the title to indemnify himself against the damages resulting from the trespasses of the latter on the ground of his insolvency, he is not entitled to do so on any other ground. There may be cases where the insolvency of a party authorizes a court of equity to set-off a debt, which would not under other circumstances be allowed as a set-off, either at law or equity (Tuscumbia R. R. Co. v. Rhodes, 8 Ala. 206); but unliquidated damages, sounding in tort, are not the subject of a set-off in either court.—Vose v. Philbrook, 3 Story's R. 335; 3 Johns. Ch. R. 351; Livingston v. Livingston, 4 *ib.* 292.—Again; the purchaser of land, having paid the purchase money, has a lien for it upon the estate.—Sug. on Ven. 386; Kennedy v. Woolfork, 3 Hay. 197; 1 Meigs 52; 3 A. K. Marsh. 179; Har. Ch. 225; *ib.* 414. The vendor and vendee are trustees for each other—one of the land, and the other of the purchase money.—2 Story's Eq. 790, 793. But the lien of the vendee does not extend to other lands; and although, upon the same principle which passes the lien of the vendor to his assignee (Roper v. McCook, 7 Ala. 318), the assignee of the vendee would be entitled to enforce his lien against the land, yet the lien of the vendee or his assignee does not extend to other lands, and for this reason a sale by the vendee before title passes ought not to take with it the burden of discharging a distinct and separate liability in no wise connected with the sale.

The chancellor should, under the circumstances, have compelled the defendant Owen specifically to perform his contract, and enjoined him from the prosecution of his suit at law; and the decree rendered by him must therefore be reversed, and the cause remanded, in order that a decree may be rendered in conformity with this opinion,—the costs of this court to be taxed against the appellee Owen.

JEWELL *vs.* CENTER & CO.

1. When application is made for a continuance to enable plaintiff to retake the deposition of a witness, (who had stated, through inadvertence on his part or that of the commissioner, that another material witness for plaintiff was interested as a partner with him,) the court may, in its discretion, continue the cause unless the defendant will consent that the other witness may testify; and if the defendant elects to let him be examined, and the witness swears that he is not interested, in which statement he is sustained by the testimony of his confidential clerk, there is no error in his admission.
2. When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and it does not lie with him to say that any portion of it is illegal or incompetent.
3. When the evidence of a custom is conflicting, it should be left to the jury to determine whether the custom is proved; but where the only evidence is that of one witness, whose testimony, not restricting the custom to any particular time or place, tends to prove the law merchant to be otherwise than it really is, the court may instruct the jury that there is no evidence of custom before them.
4. The law merchant cannot be proved by witnesses, but is matter of law for the court.
5. Evidence of a custom held to be so vague as to the length of time it had existed, and so general and indefinite as to the place of its existence, as not, *prima facie*, to enter into and form a part of the contract sued on, so as to control its provisions as a particular usage of trade.
6. The non-production by a witness of a letter spoken of by him, which he is required by the interrogatory to attach to his answer, does not justify any inference prejudicial to the party by whom his deposition was taken; its non-production after notice would only justify parol proof of its contents.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT on the common money counts, by Center & Co. against J. J. Jewell, to recover reclamations on ninety-three bales of cotton. The only plea was the general issue. On the trial, "the plaintiff moved for a continuance, for the purpose of enabling him to retake the deposition of P. G. Heirne, who had stated, in his first deposition then on file, that H. O. Brewer (who was a material witness for plaintiff) "was a partner with plaintiff in the transaction of the shipment of the ninety-three bales of cotton in question" ;—plaintiff's counsel alleging that said Brewer was not interested, that said Heirne knew that he was not interested, and that his statement to the contrary in his deposition originated in the carelessness of the commissioner, or an entire misapprehension on Heirne's part of the purport of the question and his answer thereto. The court thereupon determined, that the cause should be continued until the next term, to enable plaintiff to retake said deposition, unless the defendant would consent that said Brewer should be allowed to testify as a witness on the trial; and defendant elected to go to trial, and to permit said Brewer to be examined as a witness."

The plaintiff then introduced said Brewer as a witness, who testified, that he had been engaged in Mobile for many years, making advances on cotton for account of Center & Co. as their agent, and procuring consignments to their house in New York; "that the defendant, in February or March, 1851, shipped through him, as agent of plaintiff, who did business in New York, ninety-three bales of cotton; that a bill was drawn by defendant, on plaintiff, against said cotton, for the supposed value of the cotton less five dollars per bale, which bill matured on the 24th of April, 1851, and was duly paid by plaintiff; that said cotton reached New York about thirty days after its shipment, but was not sold until after the maturity and payment of the bill; that, after said cotton was sold, the account of sales, and also defendant's account current with Center & Co. as to the same transaction, were sent to witness, which he presented afterwards to defendant, and had several conversations with him in reference to the transaction, in which defendant objected to the conduct of plaintiffs in selling his cotton at the time and for the price they did. He further testified, that it is the custom among merchants,

when a bill is drawn against the shipment of the cotton, for the consignee who makes the advance to sell the cotton at his discretion, in the absence of instructions from the consignor; that he was not bound, in the absence of instructions, to dispose of the cotton to meet the bill, though he might do so if he thought it best." On cross examination, he further testified, that he had no interest in the shipment of said cotton, other than as an agent for plaintiff; that he was not a partner with plaintiff in the transaction, and whether this suit resulted for or against plaintiff, he could not gain or lose thereby.

Plaintiff then introduced one Fowler as a witness, who testified, "that he was the confidential clerk and book-keeper of said Brewer, and had been for a number of years past, as well as at the time said cotton was shipped and said advances made, acting in that capacity to him; that said Brewer had no other interest in said transaction than as an agent for commissions; that his commission account connected with this transaction was now closed and settled; that he was not a partner with plaintiff, and never had been; that he was formerly a partner in the house of Edward C. Center & Co. of Mobile, but that house had been dissolved before this transaction took place." Plaintiff then introduced one Whittaker as a witness, who testified, "that he was a merchant in Mobile, and had been engaged for many years in procuring assignments of cotton, and making advances thereon, in the manner in which it was done in this case; that it was the custom of merchants, in such cases, in the absence of instructions, to hold the cotton at their own discretion, without reference to the maturity of the bill drawn against it; that they were not required by custom to sell to meet the bill."

The defendant then introduced the deposition of said P. G. Heirne, taken at the instance of plaintiff in New York city, but which plaintiff had declined to use. This witness, who stated that he had been plaintiff's book-keeper in New York city for fifteen years, proved the correctness of the account of sales of said cotton, and of the account current in relation to it, (showing that the net proceeds were less than the advances by about $981,) by reference to entries in the plaintiff's books, made by witness and other clerks. The

following questions, among others, were propounded to him on cross examination: "Did you receive, or do you know that plaintiff received, a letter or letters from defendant about the time and soon after the receipt of said cotton? If yea, attach them to your answer to this interrogatory. Do you know of any letter or letters being received by plaintiff from H. O. Brewer, on the subject of this cotton? If yea, attach them to your answers to this interrogatory." The witness answered as follows: "I believe a letter was received from Jewell soon after the receipt of said cotton. I think it was sent to Mobile to be exhibited in this case; but I have no copy of it, and I don't recollect its substance. I have no particular knowledge of any letter from Mr. Brewer to plaintiff, on the subject of this cotton; but I have no doubt letters were written by him on the subject." In answer to another cross interrogatory, he testified, that "H. O. Brewer was a partner in this transaction of shipping said ninety-three bales of cotton to the plaintiff."

Defendant also introduced one Hanna as a witness, who testified, "that he was a factor in the city of Mobile, and had been from 1838; that shipping cotton was not his regular business, but he had frequently shipped cotton, both on his own account and on account of planters, and it was drawn against in each instance; that the uniform custom of merchants, in such cases, in the absence of instructions, was for the holder of the cotton to sell to meet the bill." Defendant also offered evidence to show that cotton commanded a higher price in New York at the time of the maturity of his bill, than at the time when his cotton was subsequently sold by plaintiff.

"The court charged the jury, among other things, that the testimony of Brewer was not sufficient to prove the account, but, if they believed the witness Hierne, it was sufficiently proved; that by introducing and reading the deposition of Hierne to the jury, the defendant had made it his testimony; further, that there was no evidence of custom before them; that no custom could be proved, when the witnesses contradicted each other as to its existence, or as to what it was; to all of which defendant excepted," and then requested the following charges:

"1. That, if the jury believe from the evidence that said

Brewer was a partner of plaintiff, and was interested in the shipment of the ninety-three bales of cotton, then he is an incompetent witness, and they should disregard his testimony in this case.

"2. That what witness stated in his deposition that was not of his own knowledge, was not evidence to establish the account.

"3. That what was said by witness about the entries in plaintiff's books which were not made by him, and of which he had no other knowledge than such as he derived from an inspection of said books, was not evidence to prove the account.

4. That, if they should find from the evidence that Brewer wrote a letter to Center & Co. upon the subject of the shipment of the ninety-three bales of cotton, and that Center's counsel, Center himself being present, declined to attach such letter to the deposition of witness, examined by plaintiff,—they might infer fraud, or that instructions were given before the maturity of the bill to sell said cotton.

"5. That the refusal to show or attach said letter to the deposition of said witness, when requested so to do, was a circumstance for them to consider in connection with all the facts of the case.

"6. That if they should be satisfied from the evidence that it is the general and uniform custom among merchants, though not universally acquiesced in, in the absence of instructions, when cotton is shipped and a bill drawn against it, to sell the cotton to meet the bill; and if this should not be done, and after the maturity of the bill, and before the sale of the cotton, it should decline, the loss falls on the holder."

The court refused each one of these charges, and in response to the last charged the jury, "that when cotton is held for sale by a merchant, who has made an advance upon it, in the absence of instructions as to the time or terms of sale, he is at liberty to sell at such time, and on such terms, as in the exercise of a sound discretion he shall deem proper for the interest of his principal." The defendant excepted to each refusal, and to the charge given, and he now assigns them for error.

WM. BOYLES, for the appellant:

The court should have excluded Brewer's evidence, and also that portion of Hierne's which was given from hearsay. 1 Phil. Ev. 184, 360, 447. Though the whole of an affidavit or answer must be read if any part is, yet you need not believe all equally.—*Ib.*; 2 Doug. 788; 2 Bos. & P. 542–8.—Suppose Jewell had examined Hierne as his own witness in the first place, and had called upon him to produce memoranda from the books of Center & Co.; these memoranda, when produced, would be evidence in the cause, but not necessarily conclusive evidence of the facts which they might tend to establish.—Tarleton v. Goldthwaite, 23 Ala. 346.

The court erred in the charges given. A charge which withdraws from the jury any facts, however weak, which tend to establish the point in issue, is erroneous.—22 Ala. 797; 16 Penn. State R. 22; 32 Maine 320; 15 N. H. 351; 5 Cranch 67; 13 Miss. 569. A charge which assumes a fact as proved, or which takes from the jury the right to determine the measure of credit to be allowed to testimony, is erroneous.—22 Ala. 470; 5 Strobh. 167; 4 Port. 320; 2 Munf. 230; 5 Ala. 392; 23 *ib.* 361; 5 Watts & S. 553.

The charges asked should have been given.—Desha, Smith & Co. v. Holland, 12 Ala. 513.

Evidence of custom was introduced by the defendant to show the understanding of the parties to the contract, for which purpose it is always admissible; because persons are presumed to contract in reference to it, and it becomes a part of the contract. It concerned only the usage of trade in a particular place; and to establish such a usage it is not necessary that it should have existed from time immemorial, nor for any definite or indefinite period of time: it is sufficient if the usage be established, certain, known, uniform, reasonable, and not contrary to law. If the custom has existed long enough to become a part of the law, the courts will judicially take notice of it; if not, it is matter of proof, and must be left to the decision of the jury.—1 Caines' Rep. 43; Gall. 443; 6 Peters (U. S.) 714; 2 *ib.* 148; 5 Cranch 492; 18 Johns. 230; 3 Day 346; 9 Mass. 155; Doug. 511; 4 Esp. 53; 6 Binn. 586; 5 Munf. 483; 9 Wheat. 581; 2 Gill & Johns. 136; 8 Wend.

266; 5 Pick. 15; 6 Port. 123; 27 E. C. L. Rep. 406; 34 *ib.* 227; 2 Green. Ev. p. 207; 2 Stark. Ev. p. 452.

JOHN T. TAYLOR, *contra.*

(Mr. Taylor's brief has never come to the Reporter's hands.)

CHILTON, C. J.—1. The court properly admitted Brewer to testify. He swears that he has no interest, and can be neither gainer nor loser by the result of this case; and Fowler, his confidential clerk, sustains him as to an entire absence of any interest. Besides this, he was examined by consent of defendant's counsel, which consent the court required should be given, or the cause should stand continued, being satisfied that the plaintiff was taken on surprise by the statement inserted in the deposition of Hierne that he was a partner with the plaintiff. It was discretionary with the court to impose the terms it did, and we think the discretion was very properly exercised. No court ought to suffer the rights of parties to be swept away by such inadvertencies of commissioners, when they are clearly shown to exist.

2. The plaintiffs having declined to read the deposition of Hierne, the defendant read the same to the jury; and the court charged, that by reading it to the jury, Jewell had made it his own testimony. What are we to understand, in legal parlance, by testimony belonging to a suitor? Clearly that it pertains to him who introduces it. The appellant in this case introduced it, while the opposite side refused to do so, and he thus made it his testimony,—read the whole of it without objection. After this, it does not lie with him to say it is illegal or incompetent. "Our conclusion," says the court, in Hallett & Walker v. O'Brien, 1 Ala. R. 589, "is, that where a paper or deposition is read as evidence to the jury, the party using it thus admits it to be proper evidence," &c.

3. The charge of the court assumes that there was no evidence of custom before the jury. If there was such evidence, then the charge is erroneous, as it should have been left to the jury to determine upon the conflicting proof whether the custom was sufficiently made out. What is the proof upon the subject of a custom contrary to the rule of law which obtains in the absence of it? The only evidence in this record is

found in the proof made by the witness Hanna, who testified, "that he was a factor in the city of Mobile, and had been since the year 1838; shipping cotton was not his regular business, but he had frequently shipped it on his own account and on account of planters, and it was drawn against in each instance; that in the absence of instructions, the uniform custom of merchants, in such case, was, for the holder of the cotton to sell to meet the bill," &c.

It appears that the cotton was shipped to New York, and a bill was drawn by the appellant upon the consignees, payable, we must presume, at the place of business of the latter, namely, in New York. It is evident, then, that the transaction, as respects the sale of the cotton to meet the bill, is to be governed by the law of the place where it is to be carried out and executed. The proof of a custom, made by the witness Hanna, confined it to no particular locality, and restricted it to no particular time. He says, it was the *uniform* custom of merchants for the holder to sell to meet the bill. He does not confine it to New York, nor to Mobile, nor any other particular place, but it is general—the uniform custom of merchants; that is, it is invariable, the one mode in which the transaction is performed. What is this but proof of the law merchant as applicable to this bill and shipment? This is but a system of customs, acknowledged and taken notice of by merchants and commercial nations; and those customs constitute a part of the general law of the land,—hence their existence will be judicially taken notice of by the courts, and cannot be proved by witnesses.—Bouv. Law Dic., title "Law Merchant." The court, therefore, very properly held that this was no proof of a custom, as it could not be regarded, tending as it did to establish the *law merchant* to be otherwise than it really existed, and not a particular usage or custom.

Although, as an abstract proposition of law, the charge, that a custom could not be proved where the witnesses contradicted each other, is erroneous; still it could not possibly have injuriously affected the appellant, when applied to the evidence in the bill of exceptions; for the court, as we have shown, properly told the jury there was no evidence of custom before them; the proof not tending to show a particular custom variant from the general law merchant, but what the law

merchant was as applied to the facts of the case. This, as we have said, could not be proved by witnesses; it was matter of law for the court.

Aside from the fact that the court might well have disregarded the proof of Hanna, as tending to establish what the law merchant was, and as showing it to be different from the rule which the court was judicially bound to know and enforce, it was so vague as to the length of time such custom had obtained, and general and indefinite as to the place of its existence, as not, *prima facie*, to enter into and form a part of this contract, so as to control its provisions as a particular usage of trade. In any aspect, therefore, in which it can be viewed, the charge as to the custom and the mode of proving it contains no error which could possibly have been prejudicial to the appellant.—Price v. White, 9 Ala. 563, and cases cited.

The charges asked, being in conflict with the views we have expressed, were properly refused by the court.

It is true that much of the testimony of Hierne is secondary, and would have been excluded had the plaintiff offered it, if the defendant had objected to it. But the plaintiff declined offering it, and the defendant himself offered it. He cannot, therefore, object to it as illegal: If the jury believed the proof, it clearly made out the plaintiff's case.

As to the charge upon the refusal of the plaintiffs to produce a letter spoken of by the witness Hierne, it is only necessary to say, that no inference prejudicial to a party can be drawn from the non-production of a document of this character, under these circumstances. The non-production after notice would have justified parol proof of its contents; nothing more.

There is no error in the record, and the judgment is affirmed.

PRESTON *vs.* DUNN.

1. The Chancery Court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*.
2. The improper exercise of this power may be reviewed on error, but the act itself is not void; and the decree rendered cannot be collaterally attacked by the infant for want of jurisdiction, although the appointment was made without service of process.
3. When an infant defendant to a bill of revivor is described as the deceased defendant's "only infant son whose name is unknown," the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached; especially when the infant, by his subsequent bill to redeem lands sold under the decree, shows that he is the person against whom the bill of revivor was filed.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed in March, 1853, by the appellant, Franklin Preston, an infant suing by his next friend, to redeem a tract of land, which had once belonged to his father, who mortgaged it in 1836 to C. & A. Batre, under which mortgage it was sold, by decree of the Chancery Court, in 1841, and purchased by the defendant. The bill in the foreclosure suit was filed in April, 1839; and the defendant Preston filed his answer on the 20th of May, and soon afterwards died, leaving no children at the time of his death, though a posthumous son (the present appellant) was born a few months afterwards. In December, 1839, a bill of revivor was filed against Mrs. Hetty Preston and one Cox, as administrator and administratrix of the decedent, and against "his only infant son, whose name is unknown to complainant." The subpœna on this bill was issued against the administrator and administratrix only, and was served on them; and at the May term, 1841, a guardian *ad litem* was appointed for the infant defendant, who thereupon put in the usual formal answer.

The chancellor dismissed the bill for want of equity, but without prejudice; and his decree is now assigned for error.

R. H. SMITH, with whom was A. BOYKIN, for the appellant:

It may be stated as a universal proposition, that a judgment is void against one not a party or privy to it, and this is equally true of a decree in chancery as of a judgment at law. 3 Phil. Ev. 918.

It is equally true, that in this matter there is no privity between the personal representative and heir, and that proceedings taken against the former do not bind the latter.—Mason's Heirs v. Peter's Adm'rs, 1 Munf. 446; Osgood v. Manhattan Co., 3 Cow. 622. This principle has been very often held, in reference to the question whether the heir could plead statute of limitations to the debt which was in judgment against the administrator, and I know of no case in which it has been held that he could not.

The administrator is not a necessary party to a bill to foreclose a mortgage on real estate; the heir is; in him alone is vested the estate sought to be foreclosed. However, at law, the legal estate may be considered to be after the law day; in equity the estate is still considered as in the mortgagor, or his heir, and the mortgage is still only considered as a security for a debt.—Inge v. Boardman, 2 Ala. 334–5; 3 Powell on Mortg. 963 b, and note; *ib.* 969.

Without the statute of 1843, the decree was an utter nullity against an heir not made a party, until he should be barred by the longer statute applicable to actions for recovery of lands. Assuming the heir not to have been made a party, the principle receives an absolute test by supposing Dunn, the purchaser, to have brought ejectment against the heir relying on his purchase—could he recover? It is decided he could not, in Hair v. Grigsby, 18 Ala. 45.

By that statute the right of one not a party to a decree of foreclosure to redeem is cut down to five years, after infancy removed; and this limitation applies to past as well as future decrees. It is a limitation on a previous larger right.—Clay's Dig. 329, §§ 92, 93. The complainant's infancy has not terminated; and hence the only question is, was the complainant a party to the decree under which Dunn brought.—It is insisted he was not, 1st, because he is no where *named* in the proceedings, being only described as an infant of unknown name. His mother was before the court, and it is apparent

his name could have been obtained. The decree is void as to him, and is against no body.—Doe ex dem. R. H. Bonner v. Tier, 3 Dev. 533.

2. He was not made a party for want of service, though he had been named in the process.—Armstrong v. Harshaw, 1 Dev. 187.

Conceding, for argument, that the process against the heir might be served on his mother, yet there was no process against him. His mother was a party, and the process was against her as such; and the real question is, had chancery, before the statute of 1841, jurisdiction of a person, by simply appointing a guardian *ad litem* for him, without any other steps, and without even giving him a name.

That the mode of procedure taken did not make the heir a party, I refer to Hodges v. Wise, 16 Ala. 509; Johnson v. Hainesworth, 6 *ib.* 444; Walker v. Hallett, 1 *ib.* 390.

WILLIAM G. JONES, *contra:*

1. Dunn stands in the position of a *bona fide* purchaser for value; and that, too, under a judicial sale, made under the order of the Chancery Court, and confirmed by that court.—He has the legal title, and at least equal equity with the complainant. A court of equity never grants relief against a *bona fide* purchaser for value, having the legal title and equal equity with the complainant. The maxim is, "where there is equal equity, the law must prevail." "*In equali jure, melior est conditio possidentis.*"—1 Story's Eq. § 64 c, p. 74; *ib.* § 108, p. 121; *ib.* § 381; *ib.* § 434; 2 Story's Eq. §§ 1502, 1503. The leading case on this subject is Bassett v. Nosworthy, Rep. Temp. Finch, 102, and also fully reported in 2 White & Tudor's Lead. Ca. in Eq., vol. 2, marg. page 1, (71 Law Lib.) Lord Keeper Finch there laid down the law, clearly and strongly, as follows: "A purchaser *bona fide*, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute, or mortgage, or any other incumbrance; and if he can defend himself, at law, by any such incumbrance bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz.,

where the court hath refused to give any assistance against a purchaser, either to an HEIR, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." So the law has been ever since, strengthened indeed by more modern authorities, most of which are collected in the English and American Notes to 2 W. & T.'s Lead. Cases, *supra.* This principle applies equally to purchases under judicial sales, as was recognized by this court in The Ohio Life Ins. Co. v. Ledyard, 8 Ala. R. 866, and in many cases decided in other States.—See the cases collated in the American Notes to 2 W. & T.'s Leading Cases in Eq., 71 Law Lib. top p. 109. Where the facts constituting this defence appear in the bill, (as in this case,) it may be taken by way of demurrer, as well as by plea or answer (Story's Eq. Pl. p. 580, § 603; 71 Law Lib. p. 77); and it would seem, that it would be equally good on a motion to dismiss for want of equity. As to the extent to which the courts go, on grounds of public policy, to uphold judicial sales, and protect purchasers at such sales, see Vorhies v. The Bank of the U. S., 10 Peters 449, 472–5.

2. It is submitted that the infant was a party to the foreclosure suit, and bound by it. He is made a party to the bill of revivor; the Chancery Court made him a party, and appointed a guadian *ad litem* for him. This was before the adoption of the rules of 1841. The mode in which infants of tender years (this infant was then under seven months old) were made parties, was not settled by any exact or rigid rule. The Court of Chancery was considered as itself the guardian of all infants as to matters within its jurisdiction. It took care that the rights of infants should not be prejudiced. Where an infant was of very tender years, or its name unknown, or it was kept out of the way, the court would take such course as, in its discretion seemed proper under the circumstances of each case, to make the infant a party, and protect his interest. Service of process on the mother, or father-in-law, has been held sufficient to authorize the court to appoint a guardian *ad litem.*—Thompson v. Jones, 8 Ves. Jr. 141. The court as general guardian of infants had a large discretion on this subject.—1 Dan. Ch. Pr. 203, 224; McPherson on Infants, 395, (41 L. Lib.,) and authorities cited in the chancellor's opinion in this case.

Here the father of the infant had fully answered the bill in his life-time. It would have been an idle and useless farce to serve a subpœna on a sucking baby not over six months old; and process was served on his mother and natural guardian, who had the custody of him. From the subsequent action of the court, this court might well presume that process for the infant had been issed and served and lost from the files. But this is not necessary. The court saw that the father and ancester of the infant had filed a full answer; that process had been served on the mother, and proof was made that the infant was under two years old. This was abundantly sufficient to justify the appointment of a guardian *ad litem*, as was done. There was, then, no error in that case, for which that decree could even be reversed—much less could it be held as a nullity in a subsequent suit. This view is supported by decisions of this court.

In Cato v. Easley, 2 Stew. 214, it did not appear that any process had been served on the infants, nor had any guardian *ad litem* been appointed for them. They only defended by their general guardian; yet the Chancery Court having acquiesced in this mode of defence, this court held it was no error. This must have been on the ground of the large discretion of the Chancery Court in this respect, and is sustainable on principle, and by the authority of the cases there cited. So, too, in the recent and well-considered case of Gannard v. Eslava *et al.*, 20 Ala. 732, 735, 739, 740, it was objected in argument that the infant Tuskena had not been properly brought before the court (20 Ala. R. p. 735). To this it was answered, (pp, 739, 740,) that the rule was merely directory, that the answer of Gannard and Wife represented that Octavia and Tuskena were infants, and prayed that their interest might be protected by the court; and that was what the rule in reference to infants was designed to secure for them. This view is adopted by the court; for the court says (p. 740): "They answered by guardian *ad litem*, and it sufficiently appears that their interests were protected." So, it is insisted, there was no error even in the foreclosure suit, for which that decree would be reversed.

But even if there was error in the proceedings in the foreclosure suit, (which we by no means admit,) it does not fol-

low that the decree was void, or could be collaterally impeached. It was made by a court of competent jurisdiction, and cannot be collaterally impeached. This principle has been so often decided in this court that it is needless to cite authorities to support it. An infant is as much bound by a decree rendered on the answer of his guardian *ad litem*, as an adult is.—1 Daul. Ch. Pr. 205. In Kentucky and Missouri, in cases almost identical with this, it has been held, that even the unauthorized appointment of a guardian *ad litem* does not render the decree void as to the infant, and a purchaser under such a decree will be protected against the infant.—Bustard v. Gates, 4 Dana 429; Day v. Kerr, 7 Missouri 426; 8 B. Mon. 102; see, also, Smith v. Bradley, 6 S. & M. 485, and Caldwell v. Boyer, 8 Gill & Johns. 136, 149, 185. This last case is strongly in point. See also Duval's Heirs v. McLoskey, 1 Ala. 708, 726, 732.

There was no error in appointing the master in chancery as guardian *ad litem*, as a special master was appointed to take the account.—Hodges v. Wise, 16 Ala. 509, 514. Nor is not giving a day for the infant to appear after coming of age.—Cato v. Easley, 2 Stew. 214; Kennedy v. Kennedy, 2 Ala. 631.

The bill is also fatally defective in not alleging any fraud in the decree, nor anything prejudicial to the interest of the infant.—1 Danl. Ch. Pr. 230, and other authorities cited in the opinion of the chancellor.

GOLDTHWAITE, J.—It may be conceded that, under our decisions, there was no service against the infant defendant in the suit to foreclose (Hallett v. Walker, 1 Ala. 379; Johnson v. Hainesworth, 6 Ala. R. 443; Hodges v. Wise, 16 Ala.); and it is also clear, upon the authorities cited, that the appointment of a guardian *ad litem*, when service might have been, but was not, perfected upon the infant, is an irregularity which is fatal on error. But we do not understand these cases to go any further, although it is said in Hodges v. Wise, *supra*, that as the infant defendants were not before the court, the appointment of a guardian *ad litem* for them was nugatory. The question, however, there, was not whether the appointment was void, but whether it was an irregularity for

which the decree should be reversed. Here the question goes directly to the jurisdiction, and strikes at the power of the chancellor to make the appointment.

The Chancery Court is the general guardian of all infants within its jurisdiction, and by virtue of its general powers has authority to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem;* and it is proper that the chancellor, in making the selection of the guardian, should hear the nearest relative or protector of the infant, if under the age of fourteen, or the infant himself if over that age. For this reason, if the infant is not brought into court by service before the appointment is made, we hold it to be an irregularity sufficient to reverse the decree on error; but we have found no case, which goes to the length of denying to the chancellor the power of making the appointment without service. The authority to do so results, as we have said, from the general powers which belong to the Chancery Court, and may be exercised whenever the fact of infancy is established and the infant is within the jurisdiction of the court.—Banta v. Calhoun, 2 A. K. Marsh. 166; Bustard v. Gates, 4 Dana 429; 8 B. Mon. 102; Caldwell v. Boyer, 8 Gill & J., 136; 15 Ohio 689. The improper exercise of this authority may be reviewed on error, but the act is not void, and the decree rendered could not, therefore, be attacked collaterally for the want of jurisdiction.

2. It is urged on the part of the appellant, that the decree was void, for the reason that the infant was not named in it, nor in the previous proceedings. We do not think the position can be sustained. It is true that parties are of the essence of every suit, and at equity as well as law, those who are complainants and defendants should be clearly presented as such; but equity disregards form, and looks to the substance, more than courts of law. In the bill of revivor, the appellant is designated as the only infant son of Simon T. Preston, his name being unknown; and the pleadings in the present suit do not deny that the complainant in that suit was the person against whom the bill of revivor was exhibited.—There is, it is true, a general allegation, that he was not made a party to the bill of revivor; but his own bill shows that he was the posthumous child of Simon T. Preston, and his sole

heir-at-law; and the record in the foreclosure suit, made part of the bill on the motion to dismiss for want of equity, shows that he was the infant against whom the bill of revivor was filed, and who, as we have held, was made a party by the appearance of his guardian *ad litem*. We have decided, that a decree in the Orphans' Court, in favor of the "legatees" of a testator, or the "personal representatives or legal heirs" of an intestate, or the "legal representatives" of a distributee, was void for uncertainty (Joseph v. Joseph, 5 Ala. R. 280; Turner v. Dupree, 19 Ala. 198; Kyle v. Mays, 22 Ala. 673); but the distinction between these cases and the present, is, that there the ascertainment of the parties involved a legal conclusion, while here it is a question of fact merely, which can be ascertained and made certain. Under these circumstances, we regard the designation of the party as sufficient.

Decree affirmed; the appellant to pay the costs of this court.

RUSSELL *vs.* DESPLOUS.

1. The appellee cannot insist on error in the ruling of the court below, allowing an amendment; when that ruling is not covered by the assignments of error.
2. An action for an unlawful detainer cannot be maintained, either under the general statute (Clay's Digest, p. 251) or under the special act applicable to Mobile (Pamph Acts 1847-8, p. 99), against one who, "within three years last past, unlawfully entered upon and took possession of" premises then in the plaintiff's possession, "and has since unlawfully kept and detained the possession thereof from him": this remedy only lies against a tenant who holds over after the expiration of his term, or against one who obtains or holds possession by, from, under, or by collusion with such tenant.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action (Peter Desplous v. Henry C. Russell) was commenced before a justice of the peace. The cause of action is described in the summons to be "an unlawful detainer;" while

in the complaint the plaintiff alleges, "that he has been in quiet and peaceable possession of said lot of land," which is particularly described, "for ten years past, and claiming the same in fee simple; and that while thus in peaceable possession, and within three years last past, the defendant unlawfully entered upon and took possession of the said lot, and has since unlawfully kept and detained the possession of the same from plaintiff, to his great damage," &c.

The defendant demurred to the complaint, but his demurrer was overruled; and he then pleaded, 1st, not guilty; 2d, that he and those under whom he held had had three years' quiet and peaceable possession of the premises, at and immediately before the bringing of the suit. After the evidence was heard, the justice considered that it was not sufficient to sustain the complaint, and rendered judgment for the defendant. The plaintiff then removed the case by *certiorari* to the Circuit Court, where a trial was had on issue joined, and the jury returned the following verdict: "We, the jury, find for the plaintiff"; whereupon judgment was entered in his favor. At a subsequent day of the term, the defendant moved the court to amend the judgment entry *nunc pro tunc*, so as to make it appear that he had demurred to the complaint, and that his demurrer was overruled. The plaintiff objected to the sufficiency of the evidence offered in support of this motion, but the court held it sufficient, and amended the judgment entry accordingly; to which the plaintiff excepted. The defendant also excepted to several rulings of the court, which it is unnecessary to notice, as the opinion goes only to the merits of the complaint.

The appellant, who was the defendant below, now assigns for error the overruling of his demurrer to the complaint.

Geo. N. Stewart, for the appellant, contended that the complaint was defective, because it did not aver that the defendant entered as tenant and held over, or that he entered or held under a tenant; and cited Mounger v. Burks, 17 Ala. 48; Stinson v. Gossett, 4 *ib.* 170; Grice v. Ferguson, 1 Stew. 37.

A. J. Requier, *contra*, insisted that the complaint was substantially sufficient, and cited Snoddy v. Watt, 9 Ala. 609.

CHILTON, C. J.—1. It may be that the court below committed an error in allowing the amendment of the record so as to show that a demurrer was interposed in the Circuit Court to the complaint and overruled, and that the proof before it was insufficient to justify such an amendment; but this is a question which could only be presented upon error by the party against whom the decision was made, and is outside of the assignments in this cause. It is very clear, such entry is not void, and cannot be collaterally impeached. The court had jurisdiction, and although its judgment may have been erroneous, it is valid until reversed.

2. We must then look to the complaint, and see whether it is sufficient in law to entitle the appellee, who was the plaintiff below, to this summary remedy for the recovery of the possession of the land demanded by him. The action is for an unlawful entry and detainer. The plaintiff avers that he claims to be the owner in fee simple of the land, which he describes: that he has been in the quiet and peaceable possession of said lot for ten years past, and claiming the same in fee; that being thus possessed, the defendant, within three years last past, unlawfully entered upon and took possession of the same, and has since unlawfully kept and detained the possession thereof from him, to his great damage, &c., and against the form of the statute, &c.

We think it very clear, that the allegations in the complaint fail to make out a case of unlawful entry and detainer, either as provided by the general statutes relating to the subject, or the local act of 3d March, 1848, which is applicable to Mobile. If one man, peaceably and without force, enter upon the land of another, and hold the quiet and peaceable possession thereof, there being as between them no contract or agreement whereby the relation of landlord and tenant is created, I have seen no case in our books which would make him liable as for an unlawful entry and detainer. There must either have been an actual tenancy under the plaintiff, and a holding over after the expiration of the time by the tenant, or the possession must be obtained, or held, by, from, under, or by collusion with such tenant, in order to give this remedy by the general law. The 11th section of the act of 3d March, 1848, (Pamph. Acts, p. 99,) declares, that "when any tenant, or tenants, at

will, or at sufferance, for a part of a year, or one or more years, or any person claiming by, through, or under them, or who shall take possession on their desertion or abandonment of the demised premises during the term, or before their delivery to the lessor," &c., &c., shall be guilty of unlawful detainer. In the complaint before us, nothing of the kind is charged; no tenancy of any sort is averred, nor any possession from, or by collusion with, a tenant, either at will, at sufferance, or for a specified term. The averments present the simple case of a possession within three years last past, by the owner in fee of the land, and a subsequent possession and detention without right of the defendant. This does not make an "unlawful detainer" within the meaning of any of the statutes. The court, therefore, erred in overruling the demurrer.

Some of our previous cases seem not to have taken the distinction between a forcible detainer, where the party acquires the possession peaceably, but detains it wrongfully *and by force*, in which the relation of landlord and tenant is not essential; and the case of an "unlawful detainer," which, as we have previously shown, requires the existence of a tenancy, or a holding by, from, through, under, or by collusion with a tenant, or, according to the local act applicable to Mobile, an entry or possession taken and held on the desertion or abandonment of the demised premises during the term of such demise, or before the delivery of such demised premises by the tenant to the lessor. The *forcible detention* of land, peaceably entered upon but unlawfully held, is the gist of "*forcible detainer*"; the unlawful holding over after the expiration of a term of rightful possession, by a tenant, or one entering or holding by his permission, or by collusion with him, is the gravamen of "*unlawful detainer*." The complaint before us charges neither the one nor the other.

As the cause must go back for another trial, and the facts may assume a different shape and bearing when the parties are properly in court upon a good complaint, we forbear to express any opinion upon the law arising upon them.

Let the judgment be reversed, and the cause remanded.

STALLINGS *vs.* FINCH.

1. The owner of a slave, having left her in plaintiff's possession,—telling him that, if he never called for her, plaintiff's wife was to have her,—afterwards died without calling for her, and made no disposition of her by his will: ***Held***, that these facts were not sufficient to establish a gift, as the owner had never parted with his control or right of dominion.
2. Although the donor's subsequent declarations cannot be received to invalidate his previous gift, when once it is established; yet, where the issue is whether he had parted with his dominion in favor of the donee, with whom he had left the slave, a letter subsequently written by him to the latter is admissible evidence for the purpose of showing that the latter was holding as his bailee merely.
3. But evidence that the slave was the kept mistress of her owner, and that she had children by him, is irrelevant and inadmissible for the plaintiff.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

TROVER by Silas J. Stallings against John Finch, for the conversion of a slave named Charlotte. The plaintiff, on the trial, "introduced evidence to prove that, in 1844, William Finch, who was then the owner of the slave, and who resided in Georgia, came to Alabama, and brought said slave with him, and placed her in the possession of the defendant to hold for him; that afterwards, in 1846, said William Finch again came to Alabama, and on his return home, a few miles from plaintiff's, he stopped at witness' house, who was well acquainted with both him and plaintiff; and while at his house informed witness that he had that day left said negro woman with plaintiff and his wife, and said that he informed them, when he left her there, that if he never called for her plaintiff's wife was to have her, as he would rather plaintiff's wife had her than any person else. Witness testified, also, that said William Finch had stayed at plaintiff's house several days. Plaintiff proved, also, that said negro had remained with him, from 1846, the time said Finch left her there, until some time during the spring of 1850, when she ran away, and went to defendant's, and remained in his possession until after demand made, and before the commencement of this suit,

when he delivered her up to Burdett Finch, the executor of said William Finch, who now holds her as such executor. It was proved, also, that said William Finch died, in Georgia, in 1849, while said negro was in plaintiff's possession; that he was never married; and that he left a will, in which he made specific legacies of negroes, but omitted said Charlotte in said will."

The defendant then offered in evidence a letter written to plaintiff by said William Finch, dated in May, 1847, which contained the following sentences in reference to the said negro: "Gives me great satisfaction that you all was well, and Charlotte is satisfied. * * Tell Charlotte I don't know what to do; I can't sell my land yet. * * Tell her that her father and mother is well, and all of her brothers and sisters, and her children. * * Tell her, if she can get her a good master to live with, may-be it would be best for her; but I would ask six hundred dollars for her, if she wants to be sold, and can get that price for her. I will come out there this fall. Though, if she don't want to be sold, I expect I can hire her out for something; but I think, if she had a good master, her mind would be better off, and better satisfied," &c. "The plaintiff objected to the introduction of this letter, but his objection was overruled. Plaintiff offered to prove, that the negro woman was a kept mistress of said William Finch; also, that she had children by him; which propositions were objected to, and the evidence excluded, and plaintiff excepted."

"The court charged the jury as follows: 'Defendant says that William Finch revoked the gift, and you may look to the letter written by William Finch to Stallings, and his last will and testament, to see if he intended to revoke it; and if you come to the conclusion he did so intend to revoke, you must find for defendant;' to which charge plaintiff excepted, and asked the court to charge "that, if the jury believed from the evidence that said William Finch placed said slave in the possession of plaintiff, to be the property of his wife in the event that he never called for her, and that he never called for, but departed this life leaving her in plaintiff's possession,—then plaintiff was entitled to recover"; which charge the court refused, and the plaintiff excepted.

The rulings of the court on the evidence, as above stated,

the charge given, and the refusal to charge as requested, are now assigned for error.

S. F. RICE, with whom was ROBT. BAUGH, for appellant:

1. In some cases, the declarations of a donor made before the gift, may be admitted as evidence for him; but in no case can his declarations made after the gift, be received as evidence for him, or for his representative.—Powell v. Olds, 9 Ala. 861; 14 Viner's Ab., p. 19, §§ 4 and 6; Iverson v. Nelson, 17 Ala. 220; Iverson v. Nelson, 19 *ib.*

2. A parol gift is irrevocable by the donor.

3. But even if such gift was revocable, the intention of the donor to revoke, is not a revocation.

These plain rules of law were violated by the admission of the letter of the donor as evidence for the defendant, and by the charge given by the court. That charge shows that the defendant admitted, by irresistible implication, that there was a gift by William Finch to plaintiff, but staked his defence on the revocation of that gift. The charge is based on the hypothesis and concession that there was a gift, and the jury are told they must find for the defendant, if William Finch "intended to revoke it."

4. A verbal gift in 1846 of a slave to the wife of the plaintiff, was in law a gift to the husband, (Comm. v. Manley, 12 Pick. 173), and under the evidence in this case, the charge as asked by plaintiff was correct, and should have been given.

5. Under the evidence, and after the admission of William Finch's letter as evidence for defendant, the court should have allowed the plaintiff to prove "that the negro woman was a kept mistress of William Finch"; also, "that she had children by William Finch." Each of the "propositions" of plaintiff to make this proof, was overruled. Each portion of this evidence was proposed separately, and should have been admitted, because it tends to show a special reason—an inducement—to give this favorite negro in the manner contended for by plaintiff. This evidence, in connection with the fact that the will of the donor "made specific legacies of negroes, but omitted the negro Charlotte," would have a tendency to show that the gift was made as claimed by plaintiff.—Iverson v. Nelson, 17 Ala. 216, (first head-note).

If the defendant was allowed to introduce illegal evidence, the plaintiff should have been allowed to rebut it by illegal evidence.—Havis v. Taylor, 13 Ala.

GEO. W. GUNN, with whom was J. T. BROCK, *contra:*

The plaintiff having endeavored to establish a gift by means of declarations subsequently made by the pretended donor, the letter from the donor to plaintiff was clearly admissible on the part of the defendant.—Sims v. Saunders, Harp. 374; Frisbie v. McCarty, 1 Stew. & P. 56; 1 Bailey 119; 12 Johns. 188; 9 Ala. 313.

The evidence rejected was by no means relevant to the issue: whether or not the slave was the kept mistress of the pretended donor, could furnish no aid in the determination of the question at issue, and the evidence was therefore properly rejected.—McKenzie v. McRae, 8 Porter 70; Innerarity v. Byrne, *ib.* 176.

In respect to the question of a gift: The supposed donor never parted with the dominion over the slave, but could have reclaimed her at any time up to his death. Taking all the evidence together, and giving to it an interpretation most favorable to the plaintiff, it merely indicates an intention to give; but the purpose was never consummated, the *locus penitentiæ* still remained, and no advantage can be claimed therefrom. There is, in fact, nothing in the language used, indicating a present intention to give, nor a promise to give; there was no transfer of the right to the supposed donee, and no renunciation of dominion on the part of the donor. The whole evidence falls short of consummating a gift.—Phillips v. McGrew, 13 Ala. 259. To constitute an effectual delivery, the donor must part with the dominion of the thing in favor of the donee. That the charge given was proper, and the charge refused erroneous, is shown by the following authorities: Walden v. Dixon, 5 Mon. 170; Adams v. Hay, 2 Ired. 361; Thomas v. De Graffenreid, 17 Ala. 610; Durett v. Sewall, 2 *ib.* 669; *ib.* 117; 1 *ib.* 52; 9 *ib.* 391; 15 *ib.* 91; 16 *ib.* 35; 7 Johns. 25; 2 Ves. 431; 2 Saund. 47; 5 Gill & J. 461; 1 Ark. 88; 1 Ed. 296; 2 Gratt. 344; 10 Johns. 293; 18 *ib.* 145; 1 Madd. 176; 7 Leigh 217; Riley's R. 290; 3 Shep. 479; 16 Verm. 206; 2 *ib.* 595; 1 Mur. 127; 10 Conn. 480; 2 Wheat. 17.

GOLDTHWAITE, J.—The evidence shows, that William Finch, the owner of the slave in controversy, left her in the possession of the plaintiff and his wife, informing them at the time that, if he never called for said slave, the plaintiff's wife was to have her,—that he subsequently died without having called for her, and made no disposition of her by his will; and the charge refused raises the question as to the right of the plaintiff below to recover upon these facts.

It is indispensable to the validity of a parol gift of a chattel, that the owner should part with his dominion over it.—Phillips v. McGrew, 13 Ala. 255. In Bryant v. Ingraham, 16 Ala. 114, it is said by Dargan, J.: "The mere declaration by one that he would give, or had given a chattel to another, when it is shown that the donor never parted with the possession or control of it, would not be sufficient to establish a title by gift." So, in Jones v. Dryer, 16 Ala. 221, Collier, C. J., says: "To constitute an effectual delivery, the donor must part with the dominion of the thing in favor of the donee." See, also, the cases cited in the last opinion. Here the owner never parted with the right of control or dominion, and the authorities we have cited are conclusive to show that the facts in evidence did not amount to a gift.

If the declarations of William Finch, given in evidence by the plaintiff, had established a gift of the slave from him to the wife of Stallings, then the letter which he wrote in 1847, introduced against the objection of the plaintiff, would not have been competent evidence, for the reason, that the subsequent declarations of the donor could not affect the title which the donee had acquired. But here, one of the questions involved was, whether William Finch had parted with his dominion of the slave in favor of the donee; and as the evidence tended to show that the donee was holding as his bailee, the letter was admissible, for the purpose of showing that his control over her continued up to its date.

The evidence offered by the plaintiff, as to the connection which existed between the slave and William Finch, was also properly rejected, as that fact would not, by itself, have tended to establish a gift, and when aided by the other testimony which the record discloses, would not have been sufficient to entitle the plaintiff to a recovery, upon the legal principles

we have laid down in this opinion, had the evidence been demurred to. It might, perhaps, under some circumstances, have tended to show a motive for making such a disposition of the slave, but no such circumstances are disclosed by the record, and the evidence was wholly irrelevant.

Judgment affirmed.

KELLY *vs.* BROOKS.

1. In an action by an auctioneer against the purchaser of a slave, to recover the difference between the price bid at the sale and the amount brought at a resale on the purchaser's account, a written memorandum of the sale, kept by plaintiff's clerk who was present,—accompanied by the parol testimony of the clerk, showing that the slave was knocked down to defendant, and was afterwards delivered to him,—is admissible evidence for plaintiff, as proving such a consummation of the sale as will take it out of the statute of frauds.
2. Evidence of a proposition of compromise or arbitration, and its refusal, is not admissible evidence against the party refusing.
3. If a party introduces and examines in chief a witness who has an interest adverse to him, he thereby waives all objection to his incompetency from interest, and confers on his adversary the right to examine the witness fully as to his knowledge touching any and all facts material to the case.
4. If the purchaser of a slave at public auction takes possession under his contract, without anything being said, or any understanding had, qualifying the act, and retains possession for one, two or three days, without making any objection to the sale, the jury may well infer from these facts a consummation of the contract which is sufficient to take it out of the statute of frauds.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was commenced by summons and complaint, and was brought by Augustus Brooks "to recover as auctioneer $200, being the difference between the price at which a negro was bid off by defendant, and the price brought at a resale made on defendant's account." The defendant pleaded, 1st, that he never purchased from plaintiff the said negro alleged in his complaint; 2d, that the slave which plaintiff

offered to sell him was represented by plaintiff to be sound, but defendant, ascertaining that the slave was unsound, immediately refused to receive him, and plaintiff thereupon took him and used him as his own property ; 3d, that the supposed contract for the purchase of said slave was for a sum exceeding $200,—that there was no note or memorandum in writing of said contract, signed by defendant, expressing the consideration of the contract, and that he never accepted the slave under the contract; and, 4th, that plaintiff, at the time of his alleged sale, had no title to said slave, nor any lawful authority to sell from any one having a title. The plaintiff took issue on the first, second, and third pleas ; and replied to the fourth, that he sold the said slave as auctioneer, at public auction, and had full authority to sell.

It was shown, on the trial, that the slave, at the sale, was warranted sound and healthy, and the title also was warranted. The plaintiff offered in evidence the testimony of one C. Heart, accompanied by a memorandum in pencil made by him, as plaintiff's clerk, at the time of the sale, on plaintiff's sales book ; which memorandum was as follows : "Aug. 12, 1853. Dick, Dr. Kelly—$725." Witness also testified, that he was present when the defendant bid off the slave ; that the price was $725 ; that, after the slave was struck off, defendant took him from the court-house, where he was sold, and the slave was not returned to the court-house until the next day, or the next day but one, when witness understood that defendant refused to keep him, for the reason, as defendant alleged, that he was unsound. This memorandum, and the testimony of the witness, were objected to by the defendant, because it proved a contract within the statute of frauds ; but his objection was overruled, and the testimony permitted to go to the jury, and defendant excepted."

It was proved by other witnesses that the slave was taken away by the defendant immediately after the sale, and was not returned until the next day, or two or three days thereafter—the witnesses could not remember which. The defendant also proved by Dr. Hamilton, a physician, that he had been called by defendant to examine the slave, as to his soundness, on the day of the sale, or the next day thereafter ; and that after the examination, defendant said he would not keep the

slave. The plaintiff offered in evidence a note, written by himself to defendant a few days after the sale, offering to submit the question as to the soundness of a slave to two physicians, with leave, if they disagreed, to choose an umpire, and that defendant refused to accede to the proposal. To the introduction of this evidence the defendant objected, but his objection was overruled, and the evidence allowed to go to the jury; to which ruling of the court defendant excepted.

The defendant introduced C. L. LeBaron as a witness, who testified, that the said slave was his property when sold by defendant; that he placed him in the hands of plaintiff to be sold on his account, and that this suit was brought for his benefit; "and here defendant closed his examination of the witness. The plaintiff then proposed to prove by said LeBaron, that said slave was sound at the time of the sale; to which defendant objected, 1st, because said witness had not been interrogated as to the soundness of the slave on his direct examination; and, 2d, because said witness was the warrantor and party interested; which objections were overruled, and the witness was allowed to testify as to the soundness of the slave."

"The court charged the jury, among other things, that, before plaintiff can recover, they must be satisfied that there was an acceptance and receiving of the slave by the defendant after the bid, and that the slave was sound and healthy, and the title good; that the memorandum made by Heart was not a sufficient memorandum to bind the defendant—that is, it was not a sufficient compliance with the provisions of the statute of frauds, requiring the contract, or some note or memorandum thereof, to be made in writing; that if they find the title was good, and the slave sound and healthy, they must be satisfied, before they can find for the plaintiff, that the defendant accepted and received the slave after the bid; that if, at the time the defendant took the slave after the bid, or the owner, or the auctioneer, or his clerk, authorized him to take him and examine him, or there was any understanding between them that he could take him and examine him,—such taking would not be an acceptance or receiving as required by the statute of frauds, and they should find for defendant; but, if they should find that defendant took away the slave

after he was struck off to him, without anything being said, or any understanding had, between the parties, to qualify the act,—the taking of the slave away, and keeping him for one, two, or three days, before he made any objection to the sale, would be sufficient for them to presume an acceptance and receiving within the statute of frauds; to which charge, as to acceptance and receiving, defendant excepted, and also to the said several rulings of the court."

The errors assigned are, 1st, the admission of the evidence in relation to the proposition of compromise and its refusal; 2d, in allowing LeBaron to be examined by plaintiff below against defendant's objection; and, 3d, the charge of the court as to what constituted a presumption of acceptance and receiving on the part of defendant.

C. P. ROBINSON, for the appellant:

1. The court erred, in admitting evidence of the offer of compromise, and of its refusal: it was irrelevant, illegal, and calculated to mislead the jury, and should have been excluded. Mayor, &c., of Columbus v. Howard, 6 Geo. R. 213; 12 Ala. 823; 8 Port. 176; 11 Mass. 140.

2. The court erred, also, in permitting LeBaron to testify as to the soundness of the slave. He was examined by the defendant, only so far as to disclose his entire and complete interest in the suit.—Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Peters 448, 461; Floyd v. Bovard, 6 W. & S. 75; 1 Green. Ev., p. 457.

3. The court erred, also, in its charge to the jury, "that the taking of the slave away, without anything being said or done to qualify the act, and keeping him one, two, or three days, would be sufficient for them to presume an acceptance and receiving." This is no necessary presumption: its force should have been left to the jury. Besides; how is the bare keeping of the slave for one day so inconsistent with his being so kept only to test his soundness, as of itself to repel this presumption, or any other equally consistent with the act? wherein does it demonstrate an acceptance?

E. S. DARGAN, *contra*. (No brief on file.)

CHILTON, C. J.—1. The proof made by the witness Heart, that as clerk for the auctioneer, Brooks, he kept a memorandum, which he produced, showing the day of sale, and the price at which the slave Dick was sold, and that he was taken away by Kelly, the purchaser, and not returned until the next day or day after that, was clearly admissible, as tending not only to prove the sale, but a consummation of it by the delivery of the property to the purchaser. The legality of this proof, though presented by the bill of exceptions, was not controverted in the argument; so we dismiss it, and turn to the next subject of inquiry, namely :

2. Whether the proof made of the proposal of the plaintiff to the defendant, that each should call a physician, and the two physicians should select a third, to determine as to the soundness of the slave, and the refusal of the defendant to accede to this proposal, was legal. We are unable to perceive what legitimate effect this proof could have upon the issues before the jury. On the other hand, it may be readily seen how it might have been turned in the argument to the disadvantage of the defendant, who had a perfect right to reject a proposal for a compromise and plant himself upon his supposed legal rights, if he chose to do so. Such proof would open a door to artifice in the manufacture of such documents for the purpose of making them evidence, and might be well calculated to mislead a jury, and should not be allowed.

3. The defendant, having examined LeBaron as a witness, and proved by him that the slave was sold on his account by Brooks, and not on account of Brooks, who brought this suit for said witness' benefit, objected to the plaintiff's proceeding, upon cross examination of the same witness, to prove the soundness of the slave. Whatever may have been the rule formerly, it is now well settled, that where a party introduces and examines a witness in chief, who has an interest adverse to him, he thereby gives the witness credit, waives his objection to his interest, and thus confers the right on his antagonist to examine him fully as to his knowledge of any and all facts material in the case.

4. We are unable to perceive any error in the charges of the court. They were fully as favorable for the defendant as

the law would warrant, and, taken together, presented the case in a very clear and proper light before the jury. It is too clear, we think, to admit of doubt, that if the defendant bid off the slave, and after purchasing, took the actual possession of him, and retained him for one, two, or three days, before he made any objection to the sale, and the acceptance of him was without anything being said, or any understanding had between the parties, qualifying the act, the jury might well infer from this a consummation of the contract, so as to take the sale without the statute of frauds as enacted by the Code.

For the error in admitting the proof of the proposal to call in the aid of physicians, the judgment must be reversed, and the cause remanded.

HOOPER *vs.* EDWARDS.

1. What is said by the parties to a contract at the time it is made, as to its terms, is admissible evidence as a part of the *res gestæ*.
2. What is said by the parties at the time slaves are delivered under a contract of hiring previously made, in relation to the contract, is also admissible on the same principle.
3. A contract made on Sunday, unless made under a necessity in order to prevent a threatened loss, is void (Clay's Dig., p. 592, § 1.)

APPEAL from the Circuit Court of Russell.

Tried before the Hon. EZEKIEL PICKENS.

TRIAL OF THE RIGHT OF PROPERTY in slaves, between Geo. D. Hooper, plaintiff in attachment, and Loxla Edwards, claimant. It appears that the said Edwards was the deputy sheriff of Russell county in 1848-9, and lived within one mile of the defendant in attachment, Bryant S. Mangham, from whom he had hired some negroes for the year 1848, and that he had in his hands, as deputy sheriff, several executions against Mangham, one of which (in favor of one Crews) had been indulged; that on the night of the 25th of November,

1848, which was Saturday, said Mangham ran off with his property, and on the next day (Sunday) Edwards sent an agent after him, with general instructions to arrange and settle the said executions, and another small debt which Edwards had against him; that one Adair, who also had a debt against said Mangham, accompanied said agent; that they overtook Mangham about sunset that evening, and the agent then purchased from him, for Edwards, the negroes now levied on, and agreed that Edwards should pay and satisfy the said executions in his hands, and also said Adair's claim, to which the said Adair assented; and that Edwards ratified the contract on the return of his agent.

The claimant, after having proved the existence of the debts against Mangham on which the executions were founded, and that he had paid all the claims except the execution in favor of Crews, offered to prove the conversation had between his said agent (Thornton) and said Mangham, "which immediately preceded and led to the arrangement then made between them, containing admissions by Mangham of the debts which claimant was to pay with the negroes purchased of defendant, and a statement of defendant's indebtedness and liabilities to claimant, which liabilities were the executions and claims above mentioned; to which evidence the plaintiff objected, and his objection being overruled, he excepted."

"The claimant further proved that, in the spring of 1848, about ten of the defendant's negroes were delivered to him by the defendant, to be held for him on hire for the year 1848; and at the time of the delivery, claimant and defendant spoke of a previous contract for the hire of said negroes from defendant to claimant for the year 1848;—witness being claimant's overseer. To this evidence, so far as related to Mangham's statement that he had hired them, plaintiff objected; but the court overruled the objection, and plaintiff excepted."

"The plaintiff then proved, by way of rebuttal, that the said Mangham, in the early part of the year 1848, owned, cultivated, and improved a large tract of land in Russell county; and that the said land and negroes went into the possession of the claimant in March, 1848; and here stopped with his proof on this point. The claimant then introduced the deposition of one Heydenfeldt, to show a sale of the land

above spoken of, and the hire of the negroes to claimant in 1848, by the said defendant." This witness testifies, that he had in his hands, in 1848, as attorney of one Hurt, certain notes on said Mangham for collection; that Edwards, by arrangement between himself and Mangham, gave his notes to witness in place of Mangham's, and afterwards paid them in full; "that Edwards became indebted to Mangham by the purchase from him of his land, and the hire for one year of his negroes and mules." "The plaintiff objected to so much of the deposition of said Heydenfeldt, as speaks of a sale of land from defendant to claimant; but the court overruled the objection, and plaintiff excepted."

The court charged the jury, "that, if the contract for the purchase of the negroes was made on Sunday, it was void, unless the evidence satisfied them that it was a case of necessity. The plaintiff contended, that, as neither the sheriff nor his deputy, the claimant, was liable on the Crews execution, there was no necessity that it should have proved a part of the consideration of the said contract, and so the whole contract was void as against plaintiff, and the same as to the *defendant said Adair* (?) But the court charged the jury, if a necessity existed that the claimant should, on that day, secure himself by then making the contract; and if the evidence authorized them to believe that the claimant thought, from the slaves having been in his possession when run off, that he might be made liable, or believed that good faith called upon him to secure that debt,—then its inclusion as part of the consideration of the contract did not render it void, though not liable therefor, nor for the Crews debt: that if Adair had a debt which he wished then paid or secured, and Mangham had not the money to discharge it, and Adair wished to have it secured in that way, this would not render the contract void. To which charges the plaintiff excepted."

All these rulings of the court are now assigned for error.

S. F. Rice and Geo. D. Hooper, for the appellant.

J. E. Belser and N. Harris, *contra*.

LIGON, J.—When this case was before this court at a former term (18 Ala. 280), it was held, that the declarations

and statements of Mangham were not admissible to prove the consideration of the purchase of the slaves in controversy; and that the contract, being made on Sunday, was void, unless the claimant could show such facts to exist as would satisfy the jury that a necessity existed for him to protect himself from loss by making the contract on that day.

The evidence objected to in that case, and which was improperly admitted in the court below, was composed of the declarations of the defendant, which were introduced to prove the indebtedness of Mangham to the claimant, which formed a part of the consideration of the purchase. The present record shows, that the *bona fides* of this indebtedness was established by other proof. Some declarations of Mangham, or rather the conversation between him and the agent of the claimant at the time the sale was made, was admitted by the court below, as is shown by this record. This conversation was admitted, to show the terms of the sale, one of which was, that the claimant was to take the slaves, and pay certain claims against Mangham then in his hands as deputy sheriff of Russell county, and the claim of one Adair, who was present, and assenting to the arrangement.

What is said by the parties to a contract, at the time it is made, as to its *terms*, is admissible as a part of the *res gestæ*. These sayings are not mere admissions, or declarations of the parties, but they constitute the facts of the transaction.—Babcock v. Huntingdon, 9 Ala. 869. It does not appear that the purpose of offering the proof of what transpired between Mangham and the agent of the claimant, when this sale was made, was any other than to show that one of the terms of this contract was, that the claimant should pay certain specified claims in his hands, and under his control. For this purpose, it is admissible to prove what was said on this subject by the parties when the contract was made.

It is true, that such evidence could not be received to establish the actual existence and *bona fides* of any or all the claims mentioned; but this was not the purpose of its introduction, and it is shown that these facts had been made out by other testimony before this was offered. The only purpose seems to have been, to connect and identify the *bona fide* claims against Mangham, which the claimant had paid, with

the contract of sale, and for this purpose, what was said by the parties at the time it was made was properly admitted.—12 Ala. 604; 15 *ib.* 9; 3 Phil. Ev. 1236; 18 Ala. 280.

For the same reasons, what was said in relation to the terms of the hiring from Mangham to the claimant, at the time the slaves were delivered to the latter, under the contract of hire, was rightly admitted.

The objection to the answer of the witness Heydenfeldt is not distinctly stated, nor does that answer seem to be connected (except the part of it which proves that the claimant hired slaves of Mangham in the year 1848) with any part of the case presented by the record. The bill of exceptions, however, does not pretend to set out all the proof, and we cannot, therefore, say that under all the proof it would not have been proper to show the payment of a sum of money on a sale of land from Mangham to the claimant. This is all this answer purports to prove. It is for the plaintiff in error to show that error exists, before this court can pronounce upon it, and as this is not done in the present instance, we cannot say that the court erred in allowing the answer complained of to be read to the jury.

The first charge of the court is in strict accordance with the decision of this court, when the case was here before, and is a correct exposition of the law. It declares, that a contract made on Sunday is void, unless the jury is satisfied from the proof that it was necessary for the claimant to make it on that day, in order to prevent a threatened loss.—18 Ala. 280; Clay's Dig. 592, §§ 1-3.

We do not think the second charge of the court is justly subject to exception. It seems that the plaintiff in error had contended, that inasmuch as the sheriff of Russell county could not be made legally liable for the amount of the execution in his hands, in favor of Crews against Mangham, because the plaintiff in that execution had agreed to indulge the defendant until Christmas of that year; and as the claimant was in no sense liable for the debt to Adair when he sent his agent in pursuit of Mangham; and as these debts formed a part of the consideration for the purchase and sale of the slaves in controversy,—the whole sale was void. The second charge was given to meet this view of the case, and is, in our

opinion, at least as favorable to the plaintiff in error as the law and facts of the case would justify. It submits matters to the jury which are not necessary to the claimant's recovery, and to this extent is too favorable to the plaintiff in error.

If Mangham, in consideration of the slaves delivered to the agent of the claimant, which exceeded in value the sum of the three executions on which the latter was liable for failing to levy them on the slaves before they were run off, stipulated that the claimant should pay the debts due from him (Mangham) to Crews and Adair, it could not affect the sale. The necessity, which alone could render it valid, had but little to do with these debts; it arose out of the executions in the hands of the claimant, for which he was liable, and his own debt against Mangham, coupled with the secret removal of the property which was subject to their payment, and the flight of Mangham on the first day of the week. In this emergency, the claimant might well assume to act as agent for Crews, whose execution was also in his hands, in order to secure his debt; and as Adair was present, and sanctioned what was done in his behalf, he was also agent for him (Adair) in this transaction. The charge of the court, in effect, asserts this, but it contains limitations unfavorable to the claimant, and favorable to the party excepting, of which the latter has no right to complain.

It was not necessary that the claimant should have "thought, from his having the slaves in possession, when run off by Mangham, that he might be made liable, or believed that good faith called upon him to secure that debt," as the charge asserts, before he would be authorized to act in securing either the debt of Crews, or that of Adair. An execution for the former was already in his hands as sheriff, which constituted him agent for its collection; and although its levy had been suspended for a short term by Crews, this suspension did not so separate him from this agency, as to prevent him from acting for Crews, in the emergency which had arisen, for the purpose of securing to him the amount of his debt. As to Adair, he was present at the sale, and sanctioned all that was done by the claimant as his agent.

But, as we have said, the errors in the charge, if any, fa-

vored the plaintiff in error, and he will not be allowed to claim any advantage from them.

There is no error in the record prejudicial to the plaintiff in error, and the judgment is consequently affirmed.

LAMPLEY *vs.* BEAVERS ET AL.

1. An appearance by the defendant merely for the purpose of moving to set aside the service of the writ, is not a waiver of any defect or irregularity in the service; but if, after such an appearance, he takes any action in relation to the case which recognizes it as in court, disconnected from the motion, whether the motion is then pending or not, this is a waiver of the defect or irregularity.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. ANDREW B. MOORE.

MOTION to set aside the service of process, on the ground that the defendants, at the time the writ was served on them, were in attendance on court as witnesses under subpœna.—The writ was returnable to the Spring term, 1846, and was returned executed on the defendants before the return day. At the return term, the record recites, the parties appeared by attorney, and the attorney of Beavers moved to quash or set aside the service of the writ: which motion was continued. At the Fall term, 1846, a general order was made continuing all causes not otherwise disposed of. At the Spring term, 1847, the defendants moved to have the case put on the trial docket; which motion was sustained, and the cause was ordered to be put on the trial docket of the next term. At the Fall term, 1847, the venue was changed by the plaintiff; and at the next term the papers were ordered to be sent as directed by the previous order. At the Fall term, 1848, the case was continued by the plaintiff, and again at the next term. At the Fall term, 1849, it was continued by the defendants; and at the next term it was continued on account

of the absence of the defendant's attorney. At the Fall term, 1850, it was continued by the plaintiff, and at the next term by the defendants; at the Fall term, 1851, continued by the court, and at the next term by the defendants. The motion was heard at the Fall term, 1852, and sustained by the court; to which the plaintiff excepted, and which he now assigns for error.

WHITE & PARSONS, and B. T. POPE, for the appellant.

J. B. MARTIN, *contra*.

GOLDTHWAITE, J.—We have frequently held, that a general appearance by the defendant cures the want of service of process, and is a waiver of any defect or irregularity in the service.—Gilbert v. Lane, 3 Porter 267; Naylor v. Phillips, 3 Stew. 210; Wheeler v. Bullard, 6 Porter 352; Hobson v. Emanuel, 8 *ib.* 442; Moore v. Phillips, *ib.* 567.—If the defendants had only appeared for the purpose of moving to set aside the service of the writ, this would not be a general appearance; but if they took any action in relation to the case, disconnected with the motion, and which recognized the case as in court, this would be such an appearance as would waive the defect in the process or service, and it would be immaterial whether the motion to set aside the service of the writ was pending at the time of the appearance. The record shows that, after the return term, the defendants appeared, and at their motion the case was taken from the appearance docket, and placed on the trial docket, and that subsequently to this they appeared, and the case was continued at their instance no less than three times; that all of this was before the motion to dismiss was acted on. Upon the principle we have laid down, the appearance by the defendants, and the making of the motions, was a waiver of any previous irregularity in the process.

Judgment reversed, and cause remanded.

MONTGOMERY & WETUMPKA PLANK ROAD CO.
vs.
PERSSE, TAYLOR & CO.

1. On a trial of the right of property, the claimant having applied for a continuance, it was shown that, at the last term, the cause had been continued by him on the payment of all costs, and that he had failed to comply with that order, although with full knowledge of it; and his attorney being then in court, and refusing to comply with said order, or to show cause against it, the court refused the continuance, and would not put the plaintiff on the admission of the facts which the claimant stated his absent witnesses would prove, but informed the claimant that he should not be permitted to defend the suit, unless the costs were paid, or cause shown why they should not be paid; and on the claimant's continued refusal to pay the costs, or to show cause, the court would not permit him, on the trial, to offer evidence to show title in himself to the property, and confined him to evidence merely of its value: *Held*, that the action of the court was erroneous; and the judgment was therefore reversed, and the cause remanded.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. NAT. COOK.

TRIAL OF THE RIGHT OF PROPERTY between the appellant, as claimant, and the appellees, as plaintiffs in execution. The facts are stated in the opinion of the court.

N. HARRIS, for the appellant.

WHITE & PARSONS, *contra.*

CHILTON, C. J.—At the Spring term, 1852, the cause was continued on the application of the claimant, "on the payment of the cost of the term"; and at the succeeding term it was "continued by the claimant on the payment of all costs." At the Spring term, 1853, the claimant again applied for a continuance; but it being shown that it had failed to comply with the previous orders of the court in respect of the payment of costs, although with a full knowledge that such orders were made, and being then in court by its attorney and special agent, refusing to comply with them, or show cause why it should not, the court refused a continuance, and would not put the plaintiff in execution on the admission of what

the claimant stated his absent witness would prove; and informed the claimant that it should not be permitted to defend the suit, unless the costs were paid, or cause shown why they were not so paid. On the defendant's refusal to pay the cost, or show cause, the court, on the trial, refused to permit it to offer evidence to show title in itself to the property claimed, but confined it to evidence merely of the value of the property.

It cannot be denied, that the court had a discretion over the subject of continuing the cause, and could impose such terms as is contemplated by the act conferring this power: and this court cannot properly control that discretion, when exercised within the scope of the power delegated. But while the court may impose terms as a condition of a continuance, and put the party upon the alternative of either consenting of record to the terms imposed, or refusing to submit to them, and thereby be forced to trial, it cannot, in the event the party submits to them, superadd conditions, at a subsequent term, to which the party had not consented, as a penalty for his failure to comply with those to which his assent had been obtained. *Non constat*, had these which are superadded been proposed with those to which he originally consented, he would have refused his assent, and proceeded with the trial.

The costs were imposed upon the claimant in this case, and, as it availed itself of the continuance, we will infer that it consented to the terms on which it was granted. That the claimant should offer no proof of title was not a condition imposed as one of the terms of continuance. It was superadded without the consent of claimant, and was clearly erroneous; for, in the absence of such consent, it is clear the court has not the power, either to order the defendant's plea to the merits to be stricken off the file (5 Ala. 30; 7 *ib.* 528) or, which is the same in effect, deny him the privilege of making good his defence by proof. The claimant is to be regarded as the defendant with respect to controversies of this character. The *onus* is upon the plaintiff in execution; and until he makes out his case, the claimant may remain passive. It is therefore entitled to the privileges of a defendant, and, being retained in court, should have been allowed to show its

title, so as to defeat the claim of the plaintiffs in the attachment to the property levied on.

But it is said the claimant offered no proof of title, and has not therefore been injured; but how could it offer proof, when the court had ruled that it should not do so? If the claimant had no proof, the order was nugatory. But this refusal of the judge to allow it to offer proof of title, puts the court in error,—an error going to the very gist of the controversy; and if it be true that the claimant had no such proof, this should have been shown so as to render the error harmless.

We are unwilling to sanction the doctrine of discretion to the extent to which it was carried in this case; for, if the decision be correct, it would be difficult to set bounds to it.—If the court may properly refuse the party the right of proving title to the property claimed, upon the ground that its non-payment of the cost put it in contempt, upon the same principle a bill of exceptions might be denied, or any other part of the pleadings or record controlled, and discretion might be made to cure every defect, and deprive this court of the power of revising the action of the primary courts.

Judgment reversed, and cause remanded.

WILLIAMS, Adm'r, *vs.* McCONICO.

1. An appeal bond does not require the written approval of the clerk endorsed on it: it is a sufficient approval in fact if the officer to whom the duty is entrusted signifies his assent by receiving it.
2. In this case, the appellant producing satisfactory evidence to raise the presumption that his bond was accepted by the probate judge at the time the appeal was taken, although the written endorsement on the bond referred its approval to a subsequent day, a special *certiorari* was awarded, on motion, requiring the probate judge to certify the time when he accepted and received the bond, without reference to his written endorsement.

Appeal from the Court of Probate of Sumter.

Motion to dismiss the appeal, and cross motion for a special *certiorari* to perfect the record.

PERCY WALKER, for the appellant.

JNO. F. VARY, *contra.*

GOLDTHWAITE, J.—It appears from the record, that the appellant made application for letters of administration on the estate of James O. Williams, which was decided against her on the 28th September, 1853, and an appeal taken on the same day to the next term of the Supreme Court, at which term the record was filed. It also appears from the record, that the appellant, on the same day on which the appeal was taken, executed a bond with sureties, conditioned to pay the costs of the appeal; but from the endorsement of approval of the judge of probate upon this bond, it seems not to have been approved until after the appeal was taken. The appellant, producing satisfactory evidence in this court to raise the presumption that the bond was in fact received and accepted by the judge of probate at the time the appeal was taken, moves for a special *certiorari* requiring such judge to certify the time when said bond was in fact approved, without reference to his written approval endorsed on the obligation.

In McClure v. Colclough, 5 Ala. 65, we held, that although the statute (Clay's Dig. 535, § 4) required the bond of the sheriff to be approved by the judge of the County Court, it was not necessary that the approval should be manifested by matter of record or writing. By section 119 of the Code, it is provided, that the approval of all official bonds should be in writing endorsed on the bond; but this direction does not apply to appeal bonds, or bonds taken as security for the costs of the appeal, under sections 1898, 3041, 3019, these not being official bonds. As to these, it is an approval, in fact, if the officer to whom this duty is entrusted signifies his assent or approval by receiving a bond given in conformity with the act, as security for the appeal, or for the costs. In the present case, if the judge of probate considered the bond as a sufficient security for the costs, and received it as such, that was in law an approval, and would authorize him to certify that the bond was then approved.

Motion granted.

ELLIS, USE &C., *vs.* WHITE.

1. When an execution from a justice's court is levied on land in default of personal property, a *venditioni exponas*, or order of sale, from the Circuit Court, is only the means of satisfying the justice's judgment, and does not make it a judgment of that court.
2. The common law is presumed to exist in our sister States, in the absence of an averment to the contrary.
3. By the common law, a justice of the peace had no civil jurisdiction, and his court was not a court of record.
4. Therefore, in declaring on a judgment rendered by a justice of the peace in another State, the declaration is fatally defective on demurrer, if it does not affirmatively show that the justice had jurisdiction by force of a local statute.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. THOMAS A. WALKER.

DEBT on a judgment rendered by a justice of the peace in Polk county, Tennessee, in favor of Jesse Ellis, for the use of James Campbell, against George White. The court sustained a general demurrer to the declaration, and this is assigned for error.

BENJ. F. PORTER, for the appellant :

1. A demurrer only raises a question as to the sufficiency of the allegations in law to authorize a recovery. Every thing necessary to give jurisdiction, is alleged here. If there was any matter of evidence, it could not be inquired of by demurrer.

2. Under the constitution and act of Congress, the judgment of one State is conclusive.—Westerfield v. Lewis, 2 McLean 511; Crawford v. Simonton's Exr's, 7 Port. 110.

3. If it was intended by the demurrer to raise a question as to the right to sue on the judgment, being rendered originally by a justice, this was precluded, 1st, by the certificates of the clerk and justice, which give the record verity (Hughes v. Harris, 2 Ala. R. 269; McGee *et al.* v. Sheffield, 3 S. & P. 351); for all that appears, we may have been provided with legal proof that such proceedings in Tennessee are records, *sui generis*; 2d, by the fact alleged, that the execution after

the proceedings were removed into the Superior Court, is returnable there. It could as well be objected, that a Circuit Court judgment, rendered upon an attachment, had no validity, because a justice issued the process, returnable into a higher court. The statute authorizing this would be a matter of proof, not of allegation. No allegation is necessary which merely anticipates a plea, beyond the general issue. *Nul tiel record*, and payment, were the only pleas to be put in, and as against these, the allegations are ample.

JAMES B. MARTIN, *contra:*

The demurrer to the declaration was properly sustained, first, because it was not averred that justices' courts in Tennessee are courts of record, and, secondly, because it was not averred that the person styled "justice of the peace" was sitting as a court when the judgment was rendered, nor that said act was done within his jurisdiction, nor that any suit was pending which resulted in said judgment; nor is it shown that said justice had jurisdiction over the amount, or over the defendant, or that he acted as a judicial officer.

There is no cause of action stated with that degree of reasonable certainty which the law requires. It cannot be determined from the declaration, whether a recovery is sought upon the judgment rendered by the justice, or upon that which is said to have been rendered in the Circuit Court on a removal of the cause in some way not explained by the declaration.

CHILTON, C. J.—The declaration is upon a judgment rendered by a justice of the peace, in Polk county, in the State of Tennessee, an execution on which was levied on land, and returned to the Circuit Court, where an order for the sale of the land was made; and a balance remaining due after such sale, this suit is to recover that balance. A demurrer to it was sustained, and we think very properly. The proceedings had in the Circuit Court, did not make it a judgment of that court; but a *venditioni exponas*, or order of sale, was merely granted as a means of satisfying the justice's judgment.

Considered as an action upon the judgment rendered by a

justice of the peace in a sister State, the declaration is fatally defective. We must presume, in the absence of averments to the contrary, that the common law obtains in our sister States of the Union. By that law, a justice of the peace had no civil jurisdiction.—Marshall v. Betner, 17 Ala. 836; Crabb's His. Eng. Law 278. Whenever, therefore, they exercise civil jurisdiction, it must be by virtue of local statutes, or without authority of law.

In Sheldon v. Hopkins, 7 Wend. 435, plaintiff declared in debt on justice's judgment rendered in Vermont, and averred "that it was recovered in the county of Bennington, in that State, before J. P. Esquire, one of the justices of the peace in and for said county, then and still being such justice, and having full power and competent jurisdiction in said cause, by the confession of the defendant; and that by the consideration and judgment of the said justice, the plaintiff recovered judgment against the defendant, for the sum of $171 debt," &c. On demurrer, the court (Nelson, J.,) said: "The declaration is, no doubt, defective, in not setting forth facts sufficient to give jurisdiction to the justice. The statute giving jurisdiction to the justice ought to have been pleaded. It is well settled, that the general averment of jurisdiction is not enough.—3 Wend. 267; 6 *ib.* 438;" and judgment was given for defendant, with leave to amend.

The declaration in the case before us is more defective than in that; for it is not even averred here that the justice had jurisdiction. It is said the judgment will appear by the record, but, as was said in McGee & Richardson v. Sheffield, 3 S. & P. 353, "We are not authorized to presume that such courts are made courts of record by the laws of Tennessee."

The judgment sustaining the demurrer was right, and it is consequently affirmed.

WHITLOCK'S ADM'R *vs.* WHITLOCK'S CREDITORS.

1. A void execution having been levied on the defendant's goods after his death, the sheriff sold them, and paid over the proceeds to the plaintiff in execution, and afterwards, by virtue of his office as sheriff, became administrator *de bonis non* of the defendant's estate, which was declared insolvent: *Held*, that he was chargeable, on final settlement with the creditors, with the amount for which the goods sold.

APPEAL from the Court of Probate of Limestone.

ON the final settlement of the estate of Achilles Whitlock, deceased, which had been declared insolvent, the creditors moved the court to charge the administrator *de bonis non* with the value and amount of certain goods, which had been sold by him under the following circumstances: A judgment having been rendered against said Whitlock in his life-time, an execution was issued thereon on the 29th of April, 1846, which was returned "no property found." Whitlock died on the 9th day of February, 1847, and on the 8th day of March thereafter another execution was issued on the judgment, which was levied by the sheriff on certain goods found on said Whitlock's premises, and in his possession at the time of his death. These goods were sold by the sheriff on the 22d day of March and 24th day of April, and the proceeds of sale were paid over by him to the plaintiff in execution on the 6th and 24th days of April, without notice or objection from any person. One Allen McCargo qualified as administrator of Whitlock's estate on the 15th day of February, 1847, and resigned on the 3rd day of April following, having done nothing towards the collection of the assets of the estate; and afterwards, on the 29th day of May, 1847, the administration of the estate was committed to the said sheriff. On this state of facts the court charged the administrator with the proceeds of said sale, and interest thereon; to which ruling of the court he excepted, and which he now assigns for error.

LUKE PRYOR, for the appellant.
WM. H. WALKER, *contra.*

GOLDTHWAITE, J.—The execution which was issued on the 8th day of March, 1847, was void, Whitlock having died in February previous, and more than a term having elapsed since any execution had been sued out.—Collingsworth v. Horn, 4 S. & P. 237; Holloway v. Johnson, 7 Ala. 660; Henderson v. Gandy, 11 *ib.* 431. The sheriff who levied the execution was consequently liable to Whitlock's administrator, who was in law the owner of the property, in trespass; or, as he had sold the goods, and received the money,—the administrator could have waived the trespass, and recovered the amount of the sale (Upchurch v. Norsworthy, 15 Ala. 705); and when the sheriff became administrator, as he had not been charged, the liability still continued. He was a debtor to the estate for the amount for which the goods sold, and, as he could not bring an action against himself, he was properly chargeable with the amount due from him, at the instance of the creditors, on final settlement.—Purdom v. Tipton, 9 Ala. 914.

Judgment affirmed.

WALLER *vs.* CAMPBELL.

1. When a judgment, rendered against the sureties on a guardian's bond, is paid in full by one of them, who then moves for a summary judgment against one of his co-sureties, the defendant cannot go behind the judgment and show that the guardian's default, for which the judgment was rendered, was not covered by their bond, but by a prior bond, to which he was no party, and on which the plaintiff was bound.
2. Nor will he be allowed to prove that the infant's attorney informed plaintiff, before the latter paid the judgment, that the suit was brought by mistake on the wrong bond, and that, unless the judgment was paid, another suit would be brought on the other bond; and that plaintiff, after being so informed, paid the judgment.
3. If the judgment entry shows a verdict for the plaintiff in the motion on issue joined, this is equivalent to spreading all the facts recited in the motion on the record as proved.
4. Under the Code (§ 2645) a surety, who has paid a judgment rendered on a guardian's bond against himself and his two co-sureties, is entitled to a summary judgment, on motion, against one of his co-sureties, for one half the

amount paid, when the other surety is insolvent, and the principal was dead before the judgment was rendered.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

MOTION for a summary judgment by David Campbell against Charles R. Waller, for one half the amount paid by said Campbell on a judgment rendered in November, 1851, in favor of Hugh Watson, for the use of William G. Waller, as guardian of Rachel E. Lewis (late Waller), against Annis Waller, late guardian of said Rachel, and said David Campbell, Charles R. Waller, and John R. Waller, as sureties of said Annis on her guardian's bond; said John R. being alleged to be insolvent.

The bill of exceptions states, that, on the trial of the motion, the plaintiff therein proved the rendition of the judgment against the obligors in the guardian's bond, as alleged in the notice of motion, at the Fall term, 1851, of the Circuit Court of Montgomery, for $82 05; that the suit on said bond was founded on an annual settlement made by said Annis Waller in the Probate Court on the 5th of April, 1847, showing a decree against her for $59 88; that he had paid on this judgment $102 73, on the 16th January, 1853, which satisfied it; that said Annis Waller had died before the judgment, and said John R. Waller was insolvent at the time this motion was instituted. The said bond was dated April 5th, 1847, the same day on which the decree of the Probate Court was rendered.

"The defendant then proposed to introduce proof, showing that said Annis Waller, some years before the said settlement in the Orphans' Court, was the guardian of said Rachel E., and had given the usual guardian's bond, with said David Campbell and one Spear as her sureties, and that this bond continued in force until the making of the other bond above described; that while this first bond was in full force, said Annis Waller reported her accounts for allowance to the Orphans' Court, showing that the said sum of $59 88 was the balance due to her ward on said account; that after giving forty days' notice, said account was allowed, and the decree rendered on the 5th of April, 1847, which was the decree re-

cited in the said judgment recovered against the sureties in the second bond; and that said Campbell, as such surety on the first bond, was liable for the payment of said decree before the making of the said second bond on which he and said John R. and Charles R. Waller were sureties. This testimony was excluded by the court, and the defendant excepted.

"And the defendant also proposed to prove, in connection with this proof, that said Campbell had been informed by the counsel of said Rachel Waller that there was a mistake in bringing suit on the said bond of Annis Waller, Campbell, John R. Waller and Charles R. Waller, and that, unless the money was paid on the judgment as rendered, another suit would be brought on the said bond of Annis Waller, Campbell and Spear; and that said Campbell, after being so informed, paid said judgment. The court excluded this proof, also, and the defendant excepted."

The judgment recites, that the parties came by attorney, and thereupon came also a jury, &c., "who, being elected, tried and sworn well and truly to try the issue joined between the parties, on their oath do say, that they find in favor of the plaintiff, and that the defendant is indebted to the plaintiff in the sum of $52 73; and it is therefore considered by the court, that the plaintiff recover of the defendant the sum of $52 73, the amount so found to be due to the plaintiff by the jury, together with the costs," &c.

The errors assigned are, first, that the court excluded the testimony, as shown by the bill of exceptions; 2d, in rendering judgment on the verdict returned by the jury; 3d, in rendering judgment without proof of the facts set forth in the notice; 4th, that no judgment ought to have been rendered against appellant under the notice and motion; and, 5th, that the court erred in rendering judgment against the appellant on the notice, motion, and facts shown in the record.

WATTS, JUDGE & JACKSON, for the appellant.

NAT. HARRIS, *contra.*

CHILTON, C. J.—The Circuit Court did not err in this case, in excluding from the jury the execution of the former bond by Mrs. Waller as guardian for Rachel; for, if the de-

fault of the guardian did not create an obligation upon the sureties in this bond, when they were jointly sued by the ward, this should have been shown. After judgment, and after one of the sureties has paid the entire demand, it is too late, as between themselves, when contribution is sought to be recovered, to go behind the joint judgment against them, and show that no cause of action existed against them.

But if we concede that Campbell was bound upon the first bond, and that, pending that bond, Mrs. Waller came to a settlement of her annual account, when the sum which has been recovered against the sureties on the second bond was found due from her to her ward, it by no means follows that he is bound to pay the whole debt. It was entirely competent for Mrs. Waller to obtain other securities to unite with him, and share his responsibility as to any cause of action which might thereafter accrue in the course of her guardianship; and that this default did so accrue, is conclusively settled by the judgment against the sureties.—Broughton v. Robinson, 11 Ala. 930; Cave, use &c., v. Burns, 6 *ib.* 780-2.

Neither do we think there was error in excluding from the jury what the counsel of Rachel Waller said about the mistake in bringing suit upon the second bond. If he had authority to make the declaration so as to conclude his client, it is not shown that the judgment was in anywise vacated by the party who obtained it; and being in full force, the plaintiff had the right to pay it and look to his co-sureties for contribution.

Nor is the objection well founded, that the facts set forth in the motion do not appear as proved by the judgment entry. The parties took issue, as we must intend, upon the allegations contained in the motion; for it is said a jury were sworn to try an issue, and as none otherwise appears, we must presume such issue was a general denial by the defendant of what the plaintiff in the motion alleged; and the issue being found for the plaintiff, is equivalent to spreading the facts contained in the motion, as proved, upon the record.

What are the facts? A common creditor recovers a joint judgment against three sureties; one of them pays the whole judgment; another being insolvent, and the principal being dead, he moves against the third solvent surety for a summary

judgment for one half of the amount paid by him. The jury have affirmed these facts to be true; and although, under the law as it existed before the present Code went into operation, these facts would not have entitled the plaintiff below to this summary remedy, as we have held in Nation v. Roberts, 20 Ala. 544, yet the motion, being made since the Code became the law, is fully warranted by its provisions.—§ 2645, clause 1.

Let the judgment be affirmed.

HOWARD *vs.* BUGBEE.

1. A sole plaintiff in chancery may, after answer filed, but before any order or decree taken, dismiss his bill at his own costs without prejudice. (But *note*, that this is now changed by the 28th Rule of Chancery Practice, which took effect on the first day of November, 1854.—Rep.)

Appeal from the Chancery Court of Montgomery.

Heard before the Hon. J. W. Lesesne.

The bill in this case was filed by the appellee, as a judgment creditor of one Enoch Parsons, to redeem certain lands which had been sold under a decree in chancery. After the defendant had filed an answer, but before any order or decree was taken, the bill was dismissed, on complainant's own motion, and at his cost, but without prejudice; and this is now assigned for error.

Nat. Harris, for the appellant:

After answer filed, a complainant is not entitled, as a matter of right, to dismiss his bill without prejudice.—Maury v. Mason, 8 Porter 213, 236; 2 Danl. Ch. Prac. 1200. The cases in which bills have been dismissed without prejudice, after answer filed, show that, to entitle a party then to dismiss without prejudice, it must appear, either by the answer or the testimony, that the complainant has an equity, and is entitled to relief, but, from some defect in the bill as to par-

ties, or a variance between the allegations and proof, or an irregularity in taking the testimony, that he cannot obtain the relief to which he is entitled upon the bill as filed.—4 Porter 250; 3 Stew. 239; 1 Dan. Ch. Prac. 341, n. 2; 2 *ib.* 1200; 1 U. S. Eq. Dig., p. 288, § 569.

GEO. W. STONE, *contra:*

1. The complainant has the right, as a matter of course, to dismiss his bill at any time before final decree; and such dismissal is without prejudice, whether so expressed or not.—2 Dan. Ch. Pr. 929; Cummings v. Bennett, 8 Paige 79; Bossard v. Lester, 2 McCord's Ch. 419.

2. There is no evidence that the defendant did not give his consent that the order of dismissal without prejudice should be entered, and the court will presume such to have been the case.

3. There is not, and cannot be, any evidence produced to this court that the appellant is injured by the order of dismissal: he is out of court; the costs are decreed against his adversary; and those costs are paid. This court cannot presume that another suit has been, or will be, brought.

4. If the appellant has any remedy in this case, he has certainly mistaken it. Should the appellee file another bill, without first paying the costs of this suit, then the appellant can obtain an order, staying proceedings under the new bill until those costs are paid.

GOLDTHWAITE, J.—The only question in this case is, as to the right of a sole plaintiff in chancery to dismiss his bill at his own costs, and without prejudice, after answer filed, and before any order or decree is made in the cause.—In Carrington v. Holley, (1 Dick. 280,) after a feigned issue had been directed, it was held by Lord Hardwicke, that the plaintiff might dismiss his bill before trial on the payment of the costs; and in Dixon v. Parks, 1 Ves. 402, Lord Thurlow said, that to dismiss a bill without costs was a motion of course. In Booth v. Leycester, 1 Keen 247, however, Lord Langdale, the Master of the Rolls, where the plaintiff in a cross suit obtained an order as of course to dismiss his bill, after the original and cross bill had been set down to be heard

together, said, "that he had a strong impression, at first, that a plaintiff might dismiss his own cause upon payment of the costs at any time, but on inquiring into the practice he found the rule to be otherwise; and it was certainly quite reasonable that a plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the defendant;" and the order of dismissal was held to be irregular. It is to be remarked, that no authority is cited by the Master of the Rolls in support of his opinion; and in the case of Curtis v. Lloyd, decided two years afterwards, the case of Booth v. Leycester was repudiated by Lord Chancellor Cottingham, who decided, in effect, that a plaintiff might obtain an order dismissing his bill with costs, at any time before the cause had actually been heard, and even after it had been called on for hearing. No decree had, however, been rendered in that case; so that it does not go further, than to decide that a bill may be dismissed at any time before a decree is made. See, also, Locke v. Nash, 2 Mad. Ch. Pr. 389, n. y; White v. Lord Westweath, 1 Beat. 174. The best writers on Chancery Practice lay down the same rule (2 Dan. Ch. Pr. 929; 2 Mad. Ch. Pr. 389); and the ground on which it is rested by Lord Cottingham in Curtis v. Lloyd, *supra*, that the plaintiff should be in no worse situation than if he had made default, in which case the only decree that could have been rendered, would have been for want of prosecution, dismissing his bill with costs, seems to be conclusive. The rule, as we have stated, has been generally followed by the American cases (Cummings v. Bennett, 8 Paige 79; Bossard v. Lester, 2 McCord's Ch. 419; Smith v. Smith, 2 Black 232); and, although it may occasionally be productive of some hardship, must be regarded as the law, until it is changed by authority, as it has been in England by the 117th Order of May, 1845, which provides, "that if the plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application; or, if the cause is called on to be heard in court, and the plaintiff makes default, and by reason thereof the bill is dismissed, then, and in such case, such dismissal, unless the court otherwise orders, is equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter." This rule, however, is not in force with us,

as it has been adopted since our fifty-first rule of Chancery Practice.

Judgment affirmed.

NOTE BY REPORTER.—The 28th Rule for the regulation of Chancery Practice, adopted at this term, to take effect from and after the first day of November, 1854, is a literal copy of the English Rule (117th Order of May, 1845,) above referred to. This decision, therefore, must be confined to orders of dismissal made previously to the first day of November, 1854.

ADKINSON ET AL. *vs.* KEEL, USE &C.

1. The Circuit Court, by virtue of its general and plenary jurisdiction, has power to supply a lost record.
2. On motion to supply a lost record, the proper practice is as follows: The notice of the motion must specify when the motion will be made, and must contain a copy of that which the plaintiff will move the court to enroll as the substance of the lost record; and the defendant must have reasonable personal service of the notice, and of the affidavits by which it will be supported, which affidavits may be controverted by counter affidavits. If the court, on hearing the affidavits, is fully satisfied of the correctness of the proposed substitute, it will order the same to stand enrolled as the original lost record.

APPEAL from the Circuit Court of Coffee.

The record does not show the name of the presiding judge.

MOTION "to establish a judgment, wherein Hansel Keel, for the use of Jackson, Owens & Harper, was plaintiff, and Britton T. Adkinson, John E. Adkinson and Duncan Adkinson were defendants; which judgment was rendered at the Fall term, 1850, of the Circuit Court of Coffee, for the sum of $402, or thereabouts; the said judgment having been destroyed by the burning of the court-house of said county."

The record contains a notice of this motion, (which, however, is not shown to have been served on the defendants,)

and an affidavit made by the clerk of the court, in each of which the judgment is described as above set forth; and then follows the judgment entry, which is as follows:

"The plaintiffs in this case having given the defendants notice of the intention to make this motion, and served them with copies of the affidavit upon which said motion is predicated, came the parties, by their attorneys; and the proof showing that, at the Fall term, 1850, *of this county*, the said plaintiffs recovered a judgment against the said defendants for the sum of $402, and costs, which said judgment was destroyed by fire; it is therefore considered by the court, that said judgment be established, as follows: Came the said plaintiffs, by attorney, and defendants came not, but made default; it is therefore considered by the court, that plaintiffs recover of defendants $402, and costs. And it is agreed by said plaintiffs, that, if this case should be taken to the Supreme Court, the damages in that court are released, if any should be given; and the defendants except, and take an appeal."

J. BUFORD, for the appellant, assigned errors as follows:

"1. There is error in the judgment of substitution in that the lost judgment was void, appellants not being in court, and not being parties thereto.

"2. The substituted judgment is not identical with the lost judgment specified in the notice; the lost judgment being for $402, rendered at Fall term, 1850, and bearing interest from that date, while the substituted judgment, for the same amount, was rendered at Fall term, 1853, and bears interest from that date.

"3. The substituted judgment is void, because it does not show a valid lost judgment."

MARTIN, BALDWIN & SAYRE, *contra*.

CHILTON, C. J.—There can be no doubt, that the Circuit Court, in virtue of its general and plenary jurisdiction, has power to supply a lost record. This point was decided by our predecessors, in the case of McLendon v. Jones, 8 Ala. 298, and the mode is there substantially pointed out, in which it can be done—namely, a notice, setting forth explicitly what

is intended, and such as will advise the opposite party of the affidavits submitted in support of the motion, so as to enable him to controvert them, must be given, so that the defendant may be prepared to meet the affidavits, and controvert them with counter affidavits.

The notice in this case does not conform to the requirements of the rule as laid down in that; but is deficient in failing to set forth, with sufficient precision, the judgment sought to be substituted. It does not show whether the judgment was by default, *nil dicit*, confession, or on contestation, nor the precise amount; but it was for four hundred and two dollars, "*or thereabouts*,"—it may be more or less. Indeed, the notice in this case appears to be identical with that which was held insufficient in the case of McLendon v. Jones, save that here is added the time when it was rendered, and that the judgment sought to be established was burned when the court-house of Coffee was destroyed by fire.

The frequent recurrence of such casualties requires that the rule should be stated, and the practice pointed out, more definitely, than in the case to which we have alluded. According to our views of correct practice, the notice, of which the opposite party must have reasonable personal service, must contain a copy of that which the plaintiff in the motion will move the court, at the time to be specified in the notice, to enroll, as containing the substance of the lost record, and also of the affidavits by which he proposes to prove that such is a substantial copy. The defendant may controvert these affidavits by counter affidavits; and if the court, upon a hearing on affidavits, should be fully satisfied as to the correctness of the proposed substitute, the same will be ordered to stand enrolled as an entire or partial record in the cause, as the case may be. The court should not, as in this case, render judgment for the amount, but by its order of enrollment supply the record evidence of one already in existence, the evidence of which was destroyed. Being thus supplied, the record has the same effect and efficacy as evidence of a judgment as the original record would have had.—Peake's Ev. 60; 3 Phillips' Ev. (C. & H. Notes), pp. 1066-68, and cases cited in 8 Ala. 300-1.

Judgment reversed; but as the motion cannot be renewed on the present notice, the cause will not be remanded.

LANIER ET AL. *vs.* HILL ET AL.

1. A bill for the rescission of a contract of sale alleged that the vendor sold and conveyed to two of the complainants, while the deed, which was made an exhibit to the bill, conveyed the lands to one of the complainants only: *Held* no material variance, as the defendant could not have been taken by surprise.
2. A court of equity will not rescind a contract for the sale of lands, on account of a defect in the title, when a conveyance has been executed and accepted, and there is no fraud or misrepresentation; but where there is a misrepresentation of a material fact, which was believed and acted upon by the party seeking relief, it is immaterial, in the view of a court of equity, whether or not the party making the statement knew it to be false.
3. On a bill filed by a vendee for the rescission of a contract, alleging a fraudulent misrepresentation of a material fact by the vendor, if the evidence shows an honest mistake only, the intent being immaterial, the variance between the *allegata* and *probata* is not fatal, and relief will be granted on proof of the mistake.
4. When the vendee makes out a case which entitles him to a rescission of the contract, the collection of the purchase money will be enjoined, without regard to the solvency of the vendor; and the same rule obtains against an assignee of the vendor, unless the notes were mercantile and passed in the course of trade to a *bona fide* holder.
5. If one of several joint makers of a note, given for the purchase money of land, promises a third person that he will pay it if the latter purchases it, and the latter takes the note on the faith of that promise, the promisor may, notwithstanding his promise, join with the other makers of the note in a bill for the rescission of the contract of sale; but he will not be entitled to any relief against the holder who purchased on the faith of his promise.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed by Reuben Lanier, David C. Neal, and William D. Powell, against Green W. Hill and David Culberson, to obtain a rescission of a contract for the sale of certain lands, and an injunction against a judgment at law on the notes given for the purchase money. It alleges, that said Green W. Hill, as the administrator with the will annexed of John C. Webb, deceased, after having given notice by public advertisement, sold at public auction certain lands belonging to the estate of said Webb; that he publicly declared, at the time of the sale, that he had full

authority under the will of said Webb to sell said lands; that complainants Lanier and Neal, believing and confiding in said declaration of Hill's, became the purchasers of said lands, and executed their notes for the purchase money, with their co-complainant Powell as surety; that Hill, as administrator of said Webb, afterwards made and executed to complainants a conveyance of the said lands, which is attached to the bill as an exhibit, and prayed to be taken as a part thereof; that said Hill had no authority whatever to sell said lands, having never given bond as administrator of said Webb, and not having obtained an order of sale; that complainants accepted said deed from Hill under the belief that it conveyed to them a fee-simple title to said lands; that said Hill well knew that it was of no validity, and concealed that fact from them; that he acted fraudulently throughout the whole transaction, and has fled beyond the limits of the State to escape the consequences of his fraud and illegal acts, leaving here no property of any kind whatever to respond in damages; "that said Hill handed over or transferred said note to defendant Culberson;" that suit was brought on it, in the name of Hill for the use of Culberson, and judgment obtained, notwithstanding complainants attempted to set up their defence at law; that complainants gave up the possession of said lands so soon as they discovered the want of authority on the part of said Hill to make said sale, and that George D. Hooper, who is now the administrator with the will annexed of said Webb, has obtained from the proper court an order to sell said lands, under which he has advertised them for sale.

A decree *pro confesso*, on publication, was taken against Hill. Culberson answered, averring that, before he purchased said note from Hill, he communicated with Lanier in regard to it; "and was informed by the latter that he had not then received Hill's deed for the land, but, when Hill executed a deed, defendant might consider it a good note, and if he traded for it he should be paid the amount of it at maturity, or words to that effect; that respondent thereupon, on the strength of this promise, and ascertaining from said Hill his readiness to make the deed, purchased said note."

The chancellor dismissed the bill, because as he held, there

was no allegation that complainants had obtained a conveyance, with covenants of warranty, from said Hill; and his decree is now assigned for error.

F. BUGBEE, for the appellants. (No brief on file.)

GEO. W. GUNN, with whom was J. T. LEFTWICH, *contra*:

1. The bill is fatally defective, for want of averments which are required of a vendee who seeks a rescission of his contract: there is no averment of Hill's insolvency, or inability to respond in damages, and the allegation that he has fled the country is not sufficient; and there is no averment that complainants obtained a conveyance with covenants of warranty, and were ousted by superior title.—Cullum v. Branch Bank at Mobile, 4 Ala.; Bliss v. Smith, 1 *ib.* 274; 7 Mass. 19; Freeman's (Mich.) R. 209.

2. Although the bill alleges fraud, the proof only shows an honest mistake, common to both parties, as to Hill's authority to sell. The sale was made at public auction, under such circumstances as were sufficient to put the purchaser on his guard, and therefore the maxim "*caveat emptor*" applies.—Cullum v. Branch Bank, *supra*.

3. Complainants do not show sufficient diligence on their part to entitle them to the relief asked. Six months after the sale elapsed before the conveyance was executed; within that time they ought to have looked into the facts, and repudiated the contract, if necessary for their protection; and failing to do this, the presumption is, that they elected to rely on the covenants of warranty.—1 Dana 327; 1 Johns. Ch. 213; 2 *ib.* 519; Steele v. Kinkle, 3 Ala. 352; 2 *ib.* 108; 8 *ib.* 373; 7 *ib.* 71.

4. Culberson having traded for the note, and paid a valuable consideration for it, on the faith of complainants' promise to pay it, he is a *bona fide* holder, and complainants are estopped from setting up any defence against its payment, either at law or in equity.—Clements v. Loggins, 2 Ala. R. 514; McCravey's Ex'r v. Remson, 19 *ib.* 430; Brewer v. Brewer & Logan, *ib.* 482; Steele v. Adams, 21 *ib.* 534; 8 *ib.* 373; Greggs v. Woodruff, 14 *ib.* 9; Story's Eq. § 203; 6 Vermont 529; 8 B. Monroe 559; 20 Conn. 563; 3 Barb. 222; 13 N. H. 475; 14 Miss. 550; 8 Geo. 258.

5. There are several fatal variances between the allegations and proof. The bill alleges that the lands were purchased by Lanier and Neal, and that the conveyance was made to "complainants," who are Lanier, Neal and Powell; while the deed exhibited, and offered in evidence, was to Neal only.—This allegation goes to the substance of the contract, while the deed offered was the evidence of that contract; the proof, then, does not support the averment, and it ought not to have been received for any purpose. Again; the bill alleges fraud, while the evidence only shows an honest mistake. The case certainly demands the strict application of the rule, so often laid down by this court and others, requiring the proof to conform to the allegations.—Freeman v. Swann, 22 Ala 106; Flake & Freeman v. Day & Co., *ib.* 132; Adams v. Garrett & Garrett, *ib.* 602; McKinley v. Irvine, 13 *ib.* 682; Owens v. Collins & Langworthy, 23 *ib.* 845; Gilchrist v. Gilmer, 9 *ib.* 985; Langdon v. Roane's Admr., 6 *ib.* 518; Clement v. Kellogg, 1 *ib.* 330; Maury v. Maury, 9 *ib.* 211; Moffat v. Clements, 1 Scam. 384; Gres. Eq. Ev., m. p. 243–4; 4 Por. 306; Gibson v. Carson, 3 Ala. 421; Graham v. Tankersley, 15 *ib.* 634; Julian v. Reynolds, 11 *ib.* 960; Ansley v. Robinson, 16 *ib.* 793.

GOLDTHWAITE, J.—One of the grounds on which the bill was dismissed by the chancellor was, that it contained no allegation that the complainants had obtained a conveyance, with covenants of warranty, from Hill; but on looking into the bill, we find that it does contain such an allegation. The charge, however, is, that the deed was made to the complainants, and the exhibit and proof show that it was made to Neal alone; but we do not regard this as a material variance: it is a mere clerical error in drawing the bill; and as it is apparent that the deed set out as an exhibit is the conveyance referred to, the defendants could not have been taken by surprise, and were as fully enabled to prepare their defence as if it had been charged to have been made to Neal alone.—Story's Eq. Pl. § 257.

The bill is certainly very loosely drawn, and contains a great deal of impertinent matter, which might have been struck out on a reference. It charges, however, with suffi-

cient distinctness, that the complainants, Lanier and Neal, purchased a tract of land, at a sale made by Hill, as the administrator with the will annexed of one Webb; that they executed their notes, with the complainant Powell as their surety, and subsequently received a deed, with the usual covenants of warranty, from Hill; that Hill, in making the sale, did not act under any order of court, but represented that he had authority to sell under the will, when he had no such authority; that the purchasers believed such representation, and were influenced in making their purchase by it, and received the deed under the belief that it conveyed the title.—The prayer being for general relief, these allegations, if proved, give the party a right to any relief which the chancellor could properly grant, without reference to the superfluous and unnecessary matters with which the bill is incumbered. It is true, that where the sale has been executed by a conveyance, chancery will not rescind the contract, on account of a defect in the title, in a case free from fraud or misrepresentation, but will leave the party to his remedy at law (Woodruff v. Bunce, 9 Paige 443; Cullum v. The Bank, 4 Ala. 21); but where a material fact is misrepresented, and the other party believes and acts upon it, it is immaterial, in a court of equity, whether the party making the statement knew it to be false. Hardin v. Randall, 15 Maine 332; Champlin v. Layton, 6 Paige 189; Rosevelt v. Fulton, 2 Cowen 129; 1 Story's Eq. § 193, and cases there cited. We are not prepared to say, that, in an action at law for a deceit, something more than a mistake must not be proved, in order to entitle the plaintiff to recover; but in equity, mistake is as good ground of relief, as fraud; and certainly, if the misrepresentation is in relation to a material matter, and the party is misled by it, although it may be innocent, it operates as injuriously as if it had been by design; and upon the clearest principles of morality, a court of equity should not only refuse to enforce, but should rescind a contract made under such circumstances.

It is true, that in this bill the misrepresentation is charged to have been fraudulently made, and the evidence probably does not go further than to show that it was a mistake on the part of Hill as to his authority to sell; but we do not think that makes any difference. The misrepresentation is charged

with particularity, and it is as clearly proved; and in this respect the *probata* and *allegata* correspond. The intent with which it was made is entirely immaterial, so that the allegation of fraud is superfluous. As the evidence as to the misrepresentation is full, and as it is equally clear the purchasers were deceived by it, and it went to the most material part of the contract, they have thus far made a case which would entitle them to a rescission of the contract; and as the purchase money, had it been paid, would have to be refunded, if not paid the collection of it will be enjoined, without regard to the solvency of the vendor; and the same rule obtains against the assignee of the vendor, unless the paper was mercantile, and passed in the course of trade to a *bona fide* holder.—Andrews v. McCoy, 8 Ala. 920; Greggs v. Woodruff, 14 Ala. 1.

In the present case, however, the complainant Lanier promised Culberson to pay the note sued on, if he traded for it, and he (Lanier) obtained Mrs. Webb's relinquishment of dower. The evidence shows that the relinquishment of dower was obtained; and Culberson having bought the note on the strength of Lanier's promise, the latter has no ground of relief against him.—Clements v. Loggins, 2 Ala. R. 514. But this circumstance does not deprive him of the right, which he has in connection with his co-plaintiff Neal, to rescind the contract of sale, if he insists upon it, although, by force of the promise he has made, he would be liable to pay one of the notes given for the purchase: all the complainants would be entitled to a rescission, and Neal and Powell to an injunction against the defendant Culberson, restraining him from the collection of the note sued on, which last relief Lanier would not be entitled to, on grounds entirely personal and independent of the contract of sale.

Let the decree be reversed, and the cause remanded, that a decree may be rendered in conformity with this opinion, the appellees paying the costs of this court.

CHILTON, C. J., not sitting.

KENNEDY *vs.* MILLSAP, USE &C.

1. A judgment by default, against a defendant who was not before the court, purporting to be founded on an original attachment, which nowhere appears in the record, but which was prayed for and obtained (if at all) by the person for whose use, in the name of another as nominal plaintiff, the judgment was rendered,—is wholly irregular and erroneous, and cannot be aided by any intendments.

APPEAL from the Circuit Court of Coosa.
Tried before the Hon. GEO. D. SHORTRIDGE.

S. P. STORRS, for the appellant.
ELMORE & YANCEY, *contra.*

CHILTON, C. J.—The proceedings in this case were wholly irregular, and cannot be sustained. The affidavit states that the defendant, Kennedy, is indebted to John R. Chappell, who makes the oath, in the sum of seventy-five dollars. The bond is executed by Chappell, and recites that he has prayed for and obtained an attachment against the estate of Kennedy. There is no writ of attachment in the record, and no evidence that there ever was one, nor anything to show that Kennedy was brought in any way before the court. The declaration introduces a new plaintiff, Thomas Millsap, one not mentioned before in any of the proceedings, and omits the name of Chappell who made the affidavit and executed the bond; and the judgment, which is by default, is, "that Thos. Millsap, who sues for the use of John R. Chappell, recover," &c. There is a judgment against Creed M. Jennings, but no evidence that he was summoned as a garnishee other than the recital in the judgment that he, a garnishee, being called, came into court, and answered.

It is needless to inquire how many of these omissions may be aided by intendment. It is sufficient that Kennedy was not before the court, and that a judgment has been rendered against him by default; and this, too, as upon an original attachment, which nowhere appears, but which was prayed for and obtained (if at all) by one who makes no complaint against him in the Circuit Court.

Let the judgment be reversed, and the cause remanded.

STEIN *vs.* McARDLE & WATERS.

1. Under the act "to regulate the sessions of the Circuit and City Courts of Mobile," (which provides (Pamph. Acts 1853–4, p. 92, § 8) that execution shall issue at the expiration of twenty days from the rendition of any judgment, and "that the said judgment shall be final, in every respect the same as if the minutes of the court had been signed, and the court adjourned; but the defendant shall not be thereby prevented from moving for a new trial, or in arrest of judgment, nor deprived of any right he would otherwise have had,") a bill of exceptions, which is not reduced to writing and presented to the judge for signature until after the expiration of twenty days from the rendition of the judgment, will be regarded as not presented until after the adjournment of the court.
2. A bill of exceptions, which was not reduced to writing and presented to the judge for signature within the time prescribed by statute, cannot be established (Code, § 2856) upon proof that the cause, which involved less than $20, was submitted to the judge without the intervention of a jury, and was held under advisement by him,—that the counsel of the party excepting frequently applied to him to know whether he had decided it, and was told by him that he had not; and that a judgment was afterwards rendered by him without notifying the counsel, although they were in daily attendance on court, of which they had no notice whatever until after the expiration of the time prescribed for signing bills of exceptions.

APPEAL from the City Court of Mobile.
Tried before the Hon. ALEX. McKINSTRY.

MOTION to establish a bill of exceptions. In support of the motion, Mr. ROBINSON, of counsel for the appellant, submitted the affidavits of himself, Mr. Blount, and Mr. Chamberlain, who were attorneys for the appellant in the court below, in which they stated that the case (involving less than $20) was submitted to the decision of the court without the intervention of a jury, and was taken under advisement; that they frequently applied to the judge to know whether he had decided the case, and were informed by him that he had not; that they were in daily attendance on the court, and had no notice whatever that the case had been decided until more than twenty days after the rendition of the judgment, when they learned that an execution had already been issued on it; that they immediately prepared the bill of exceptions, (which

is sworn to be correct,) and handed it to the judge for his signature, but he refused to sign it.

Endorsed on the bill of exceptions, is the following certificate of Judge McKinstry:

"I certify that I do not think the attorneys of Mr. Stein are chargeable with negligence in not presenting their bill of exceptions. The case was taken by me under advisement, and no decision was publicly announced by me; nor did I give Mr. Stein's attorneys notice of having rendered the same, although the judgment was entered on the minutes of the court. But, as the bill was presented for my signature more than twenty days after the rendition of the judgment, I did not conceive that I had power to sign it."

C. P. ROBINSON and F. S. BLOUNT, for the motion.

J. Y. BLOCKER, *contra.*

GOLDTHWAITE, J.—A motion is made to establish a bill of exceptions in this case under section 2356 of the Code. The affidavits, on which the application is based, show that the exceptions were not reduced to writing, and submitted to the judge for his signature, until more than twenty days after the rendition of the judgment; and as under the eighth section of the act of 17th February, 1854. (Acts 1853–4, p. 92,) the judgment after that period became final, as much so, in the language of the act, "as if the minutes of the court had been signed, and the court adjourned," we must regard the exceptions as if they had been presented after the adjournment of the court, in which case, the judge is prohibited from signing the same, unless by the consent of the counsel in writing, when it may be signed within ten days thereafter (Code, § 2358).

It is urged, however, on behalf of the application, that a state of facts is shown by the affidavits submitted, which should take the case out of the statutory rule. These facts are, that the case being under twenty dollars, and for the determination of the court without the intervention of a jury, was, after the trial, taken under advisement; that the counsel frequently applied to the judge, to learn whether he had decided the cause, and was informed by him that he had not;

and that a judgment was ultimately rendered by the judge without notifying the counsel, although the latter was in daily attendance upon the court. The law requires all judgments to be entered on the minutes of the court, and a recourse to them would have furnished to the counsel the necessary information. It did not devolve upon the judge, as a legal duty, to notify the counsel of his judgment; and his not doing so could therefore furnish no ground for the failure to comply with the requisitions of the statute, which, in effect, demands that the bill should be presented before the adjournment of the court.

The motion must be denied.

KENNEDY & MERRITT *vs.* YOUNG, GUARDIAN &C.

1. An error of the clerk, in introducing in the judgment entry the name of a stranger as guardian of the plaintiff, may be amended by reference to the declaration on file, in which plaintiff declared in his own name without the intervention of a next friend or guardian; and it therefore will be amended on error or appeal, at the costs of the appellant.
2. The appearance of the defendant, and the withdrawal of his plea, are a waiver of any defect in the service of process, and an admission of the legal liability charged in the declaration.
3. In assumpsit on a promissory note, if the defendant, after appearance, withdraws his plea, the court may render judgment for the amount of the note and interest thereon, without regard to the amount of damages laid in the declaration.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. GEO. D. SHORTRIDGE.

THE record in this case is very defective; it contains, 1st, a declaration in assumpsit, by John R. Chappell against Lewis Kennedy and James Merritt, on a promissory note for $275, the damages being laid at $200; 2d, an affidavit of the loss of the note on which the suit was founded, by a fire in Wetumpka; and, 3d, the judgment entry, which is as follows: "This day came the parties, by their attorneys, and the de-

fendants, withdrawing their plea, say nothing in bar or preclusion of the plaintiff's action; it is therefore considered by the court, that said plaintiff, Bolling Young, guardian of John R. Chappell, recover of said defendants, Lewis Kennedy and James Merritt, the sum of $292 50, the damages in the declaration mentioned, together with the costs in this behalf expended," &c.

S. P. STORRS, for the appellants, assigned for error—

"1. That there is no writ.

"2. There is no note, and no sufficient accounting for the absence of the instrument sued on.

"3. The judgment is not rendered in the name of the parties set out in the declaration.

"4. The judgment exceeds the damages laid in the declaration."

He cited Elliot v. Smith, 1 Ala. 74; Dinsmore v. Austill, Minor's R. 89; Flournoy v. Childress, *ib.* 93; 1 Stew. 18.

ELMORE & YANCEY, *contra*, cited Ethridge v. Fuller, 6 Ala. 58; Patterson & Hinson v. Burnett, *ib.* 844; Duffee v. Pennington, 1 *ib.* 508; McBroom v. McBroom, 19 *ib.* 176; 2 Watts & S. 135.

CHILTON, C. J.—The judgment entry in this case shows that the defendants, Kennedy and Merritt, withdrew their plea, and remained undefended, saying nothing in bar or preclusion of the plaintiff's action, &c., and the court proceeded to render judgment against them for the damages in the declaration mentioned. The declaration which is in the record, and which we must regard as the one on which the judgment was predicated, is not in the name of Bolling Young as guardian of Chappell, but is filed by John R. Chappell in his own name. This is an error of the clerk in introducing the name of Young, and may be amended by recurring to the declaration, and could be amended in this court. It therefore furnishes no ground of reversal.—Patterson & Hinson v. Burnett, 6 Ala. 844; Clay's Digest, pp. 321,-2, §§ 50—54.

The appearance of the defendants, and withdrawal of their plea, is, as we have often decided, a waiver of any defect in

the service of process, and an admission of the legal liability charged and averred in the declaration; so that, whether this suit was commenced by ordinary or extraordinary process, is not, in the aspect presented by this record, material. They were present in court, and made no objection, either as to the manner in which they were brought there, or to the plaintiff's recovery.

The demand is on a promissory note; and upon a default, or *nil dicit*, it is competent for the court to render judgment without the intervention of a jury,—the amount of the note, with the interest which has accrued, being the amount to be recovered. The court will look to this, rather than to the amount of damages laid in the conclusion of the declaration. If interest has been miscalculated, it must be regarded as a clerical misprision, and may be here corrected.

There are some old decisions which hold that, when the recovery exceeds the damage laid in the declaration, the judgment is erroneous.—See Dinsmore v. Austill, Minor's R. 89; Flournoy v. Childress, *ib.* 93; Derrick v. Jones. 1 Stew. 18. But, although we do not find that these decisions are expressly overruled, this court, in cases like this, has frequently departed from them, and by repeated decisions has held, that where the principal and interest on a note constitute the sum to be recovered, the court may render judgment for the same irrespective of the *ad damnum* clause in the declaration.—See McWhorter v. Standifer, 2 Porter 519; Elliot v. Smith & Co., 1 Ala. 74. The earlier decisions, so far as they apply to cases like the present, must be considered as overruled.

It results from what we have said, that the judgment of the Circuit Court must be here corrected, and affirmed, at the costs of the appellants.

BANK OF ST. MARYS, WINTER, ET AL.,
vs.
ST. JOHN, POWERS & CO., AND HENLEY.

1. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. Such a bill may be maintained under the general powers and jurisdiction of the court, which regards the capital stock of the company, and all its assets, as a trust fund for the payment of its creditors, and the directors, stockholders and agents as trustees.
2. As against the bank, if the bill is verified by affidavit, and alleges that the bank is located in another State, and has property and choses in action in this State, it may also be sustained under the attachment law of 1846; and if it further alleges that the notes were issued and put in circulation in this State by the president, who is charged to be the principal stockholder and a non-resident, it is also well filed against him under that act.
3. When a bill in equity is filed, under the attachment law of 1846, against a debtor who is alleged to be a non-resident, the defendant cannot deny his non-residence.
4. If the president of a foreign bank is required by its charter to be a resident of the State in which it is located, he cannot, when sued by its creditors here, be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold that office by reason of his residence in this State.
5. The surrender to a bank agent of its notes, and the acceptance from him of his draft on a third person, is but the substitution of one security for another, and does not extinguish the original liability on the notes, unless the draft is drawn in good faith, and accepted as an absolute payment and discharge of the notes; and even if it was, through the fraud of the agent, accepted as an absolute payment, the fraud would prevent it from so operating.
6. If the defendant, after an irregular decree *pro confesso* has been entered against him, appears by solicitor, and makes motions in the cause, without objecting to the irregularities in the decree, he will be held to have waived them, and cannot take advantage of them on error.
7. A decree *pro confesso* will not be set aside to allow a plea to be filed.
8. If a bank allows its stockholders to withdraw its funds to the amount of their subscriptions, and to use them, without security, in their private business, such conduct is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands and all profits made from its use.
9. An officer or stockholder of a foreign banking corporation, who issues and puts in circulation in this State its notes, is individually liable for their payment.—Clay's Dig., p. 138, § 3.

10. If a bank, on the eve of insolvency, having notes out which it cannot redeem, and a large claim on a solvent stockholder for money lent, extends his debt by taking his notes, payable at two and three years, with its president as sole surety,—this is a fraud on its creditors, and they may proceed in equity directly against such debtor, without a judgment at law or process of garnishment.
11. When a firm is conducted under the individual name of one of the partners, the others, although they have given public notice of their interest in the firm, and are active, managing members, are dormant partners, and as such not necessary parties to a bill filed by the principal partner to enforce the payment of a firm debt from a debtor who contracted in ignorance of the dormant partners. (GOLDTHWAITE, J., *dissenting*.)
12. Stock in a plank-road company is a chose in action, which may be subjected in equity under the attachment law of 1846.
13. When a cause is submitted at a regular term of the court, and held under advisement until vacation on request of defendant's solicitor, the defendant cannot complain on error that the chancellor rendered his decree in vacation.
14. When defendants are held liable on the original bank notes held by complainants, they are liable only for the amount of the bills and interest, and not for statutory damages on a draft which was substituted for the notes, and was protested for non-payment.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed on the 24th April, 1852, by St. John, Powers & Co. and John Henley, against the Bank of St. Marys, a corporation chartered by and located in Georgia, John G. Winter, a citizen and resident of Georgia, Joseph S. Winter & Co., John C. Holcombe, L. B. Moody, and Tarleton & Whiting. It alleges that complainants are the holders and owners of a bill of exchange for $20,000, dated at Bank of St. Marys, Columbus, Ga., April 5, 1852, drawn by Geo. W. Winter, as cashier of said Bank, on said Holcombe, payable to the order of John D. Carter, and by him endorsed; that this draft was accepted by Holcombe before maturity, was duly presented for payment at maturity, and, payment having been refused, was protested for non-payment, of which the drawer and endorser were duly notified; that complainants, about 5th April, 1852, were the holders of $20,000 in bills purporting to have been issued by the Bank of St. Marys, payable on demand; that they presented these bills for payment at the said Bank, but payment was at first refused; that,

after some negotiation with the officers of the Bank, they gave the said draft for the said notes, and the notes were thereupon surrendered; that the draft was received for the accommodation of the Bank, and on the express assurance of its officers that it would be promptly paid; that said Holcombe was at that time the agent of said Bank, and of said Joseph S. Winter & Co., but his individual responsibility afforded no security whatever, and was not relied on by complainants in accepting said draft; that they accepted the draft on the positive assurance, and also on the expectation raised by the known relations subsisting between Holcombe and the other parties, that it would be paid out of the effects in Holcombe's hands, belonging either to the Bank or to Joseph S. Winter & Co.

The bill further alleges, that the Bank of St. Marys was chartered by the Legislature of Georgia in 1836, with a capital of $50,000, and located at St. Marys, a small town on the Atlantic coast, where it transacted business for several years; that while thus in operation it attracted the attention of John G. Winter, who in some way obtained control of its stock, and procured from the Legislature of Georgia a change in its location to Columbus; that, after its location at Columbus, its principal business was really conducted at Montgomery, Alabama, by John G. Winter and Joseph S. Winter & Co., in its name; that John G. Winter is the president, has the entire charge and management of its affairs, and is the principal stockholder; that he has exercised his power and control over the Bank to carry on his own individual business, and that of J. S. Winter & Co.; that they issue the notes of the Bank at Montgomery, in all the operations of their business, and redeem them there at a small discount; that it is publicly known and understood that any business with the Bank can be transacted at Montgomery through the firm of J. S. Winter & Co.; that there are now in circulation in this State, of the notes thus issued at Montgomery, from the best information complainants can obtain, at least $500,000.

It further alleges, that the charter of the Bank requires seven directors to be chosen, four of whom make a quorum, and limits the debts to three times the amount of capital paid in, and makes the directors individually responsible for any excess; that it requires an annual election of directors, who

must be residents of the State of Georgia, and from them the president must be chosen; that no election of directors has been known to have been held for several years past, and no board of directors has been summoned or consulted by the president for more than two years; that the president exercises an unlimited and unrestrained discretion in the management of all its affairs, and has used the name of the Bank as a device by which he could carry on the business of banking, and issue bills for circulation in this State, against the policy and statutes of the State; that the notes of the Bank held by complainants were issued by J. S. Winter & Co. at Montgomery, and were acquired by complainants in the regular course of business; that the president and cashier of the Bank, at the time said draft was drawn on Holcombe, knew that it had no funds with him, and that J. S. Winter & Co., after the draft was drawn but before its maturity, withdrew from him all the effects which were standing in their names; that John G. Winter and Joseph S. Winter & Co., through the means aforesaid, have acquired a large property in real and personal estate, stocks, &c., while the Bank has suspended payment, and become insolvent; that they are legally responsible for the debts of the Bank, because they have long since withdrawn from it whatever capital the Bank may have once had; that they knew long since that the Bank had a fictitious basis, and that it would never redeem the notes which they were putting in circulation; that they are also liable to the creditors of the Bank for the sums which they have withdrawn from it, and for which they have never accounted; and that they have become legally and equitably bound to pay the said debt.

It is further alleged, that the Bank of St. Marys is located in Georgia, and that John G. Winter also resides there; that Holcombe, Moody, and Tarleton & Whiting reside in Alabama, and have effects of John G. Winter in their hands; that Jos. S. Winter & Co. reside in Montgomery, and have effects of the said Bank in their hands, "and are also liable to pay complainants' debt, in the manner above stated, as parties and partners directly interested and concerned in the circulation of the bills of said Bank, as having used them for their own emoluments, without accountability or control, and as debtors

of the Bank." The Bank, John G. Winter, and Joseph S. Winter & Co. are particularly interrogated as to all the transactions between them, and the other matters charged in the bill; and the prayer is, "that an attachment may issue to seize the effects that may be found in this State, either of the said John G. Winter or the Bank of St. Marys, in the hands of the parties to this bill, or elsewhere; that Joseph S. Winter & Co. be enjoined from disposing of the effects in their hands, or under their control, either of the said John G. Winter or the said Bank; that the said Holcombe, Moody, and Tarleton & Whiting be placed under a similar injunction as to all the effects of the said Bank or John G. Winter, either individually or as a member of said firm; that the said Bank of St. Marys and John G. Winter be decreed to pay complainants' draft out of effects attached under this bill, and if they are insufficient, that other process may issue to seize other effects of the said parties; and that such other and further relief be granted as may be consistent with the case made by the bill, and with equity and good conscience."

The bill was verified by the oath of Newton St. John, one of the complainants, and an attachment and injunction were granted according to the prayer of the bill. A decree *pro confesso*, on publication, was entered against the Bank and John G. Winter, on the 26th July, 1852; and on the same day John G. Winter and Joseph S. Winter filed their answers. John G. Winter alleges that he was a citizen of Alabama at the time the bill was filed, and also sets this up as a plea; and further alleges that he was not indebted to the Bank, and had none of its property or effects in his hands, except that he was liable to the Bank, as surety of Joseph S. Winter, on certain notes executed about the 1st April, 1852, payable in two and three years, the aggregate amount of which exceeded $100,000. Joseph S. Winter & Co. answer that they were not indebted to the Bank, but on the contrary the Bank was largely indebted to their firm. Holcombe's answer admits assets in his hands belonging to Joseph S. Winter & Co. to the amount of $18,971, to the Bank $510 25, and to John G. Winter $48 18. Tarleton & Whiting denied all indebtedness whatever.

The Bank afterwards appeared by solicitor, and sued out a commission to take its answer; and subsequently moved to

set aside the decree *pro confesso*, and for leave to file its answer, in which it sets up, by way of plea, that a suit was commenced against it in Georgia, by John Henley, on the said draft, which resulted in a verdict and judgment in its favor. An amended answer was subsequently filed by Joseph S. Winter & Co., in which they allege, as a newly discovered fact, that James Farley and Thomas J. Moulton were interested as partners in the firm of John Henley, and were therefore necessary parties to the suit.

The testimony in the cause is very voluminous; such portions as are material to the points here presented are stated in the annexed arguments of counsel, and in the opinion of the court. The cause was submitted for final decree during term time, but was held under advisement by the chancellor, and the decree subsequently rendered in vacation. The chancellor held, that the bill was well filed; that the defence set up by John G. Winter, as to his residence in this State, was not sustained by the proof, and, even if it were proved, could not avail him, because the grounds on which the attachment was sued out are not traversable; that Moulton and Farley were not necessary parties to the suit; and that the complainants, on the case made by the pleadings and proof, were entitled to the relief prayed. He therefore rendered a decree in favor of the complainants, against the Bank, John G. Winter, and Joseph S. Winter & Co., for the amount of the draft, with interest and five per cent. damages thereon, and condemned the assets and effects attached to its payment. On this decree, and the other proceedings in the cause, numerous errors are assigned, for which see the argument of the appellants' counsel.

JOHN A. ELMORE and THOS. H. WATTS, for appellants:

To show error in the decree we make the following points:

We say that there is no equity in the bill of complaint, either upon general principles of equity jurisdiction, or under the statute of 1846.

1. As to the equity against the Bank, independent of the statute of 1846: The bill of complaint seeks a recovery on a bill of exchange for $20,000, and if this cannot be done, then it seeks a recovery on the bank bills, given for the bill of

exchange. So far as the Bank of St. Marys is concerned, this is, unquestionably, merely a simple contract debt, a liability on the bill of exchange or on the bank bills. There is no judgment against the Bank; and the Bank has not been dissolved. There are no funds, assets, or other property of the Bank, upon which the complainants have any lien or trust given, either by express contract, or by operation of law. It is not shown that the transaction on which the bill is filed took place in this State, unless the receipt of the bank bills here is of that character. And as to this, the complainants allege that this was an illegal transaction, both by the laws of Alabama and Georgia, and without authority from the Bank, or its directors; that John G. Winter and J. S. Winter & Co. issued them here, in violation of the laws of Alabama, and in the express violation of the Bank charter; and it is proved that Henley was aiding them by his efforts,—that he was sustaining the credit of these illegal issues down to within a few days of the suspension, and even after the protest of the bill of exchange.—Clay's Dig., § 48, p. 353. Now the universal rule is, that simple contract creditors cannot ask relief in equity until they have exhausted their legal remedy, unless they have some lien or trust, or unless some statute gives the remedy.—See Sanders & McLaughlin v. Watson, 14 Ala. 198; Beck v. Burdett, 1 Paige 305; Brinkerhoof v. Brown, 4 Johns. Ch. 671; McDurmot v. Strong, 4 *ib.* 687; Reese & Heylin v. Bradford, 13 Ala. 837; Bloodgood v. Hartley, 16 *ib.* 233; Roper v. McCook & Robertson, 7 *ib.* 318.

2. As to equity against John G. Winter and J. S. Winter & Co.: But first as to John G. Winter: There is no judgment against him. He occupies in no respect the relation of a trustee of the complainants. His relation is that of a trustee of the Bank, and of the corporators—the stockholders of the Bank. The only way in which, by possibility, he could be held personally responsible as a trustee to creditors, would be by reason of his responsibility to the Bank or to the stockholders, and the liability of the Bank or the stockholders to complainants; thus working out an equity in favor of the complainants, by some sort of subrogation to the equities of the Bank or stockholders. This, however, can only be done after a judgment at law against the Bank, and after exhaust-

ing the legal remedies; and then it is not a personal responsibility, but a lien or trust on the property of the Bank. And this responsibility, lien, or trust, could not exist in favor of the Bank, so as to be transferred to its creditors, neither could the right of subrogation, as to this, exist, if it was personal responsibility for mismanagement and breaches of trust; for these would be choses in action of such character, that no trust or lien on them could be transferred by contract, and, of course, by no operation of law. This right of subrogation attaches to property—things existing as property only—and not to such choses in action as are mere rights to recover damages. Could the Bank make an assignment to complainants of all its rights of action against Winter for his mismanagement and breaches of trust, which would enable them to file a bill in their own name against him? Neither does the case stand as one where creditors of a corporation are seeking to make stockholders liable for unpaid stock not called in by the corporation; because the liabilities of such stockholders as to this unpaid stock are debts by contract, payable when they are called for; and when they are called for, the stockholders owe the amount, and may be sued at law. In such case, the bill of the creditors of the corporation is filed to have the stock called in, to do what is the duty of the corporation, which duty it has failed to perform; and in such bill these facts must be alleged, and it must be further shown that the creditors have obtained their judgments at law, and have had execution returned unsatisfied.—See Godwin *et al.* v. McGehee, and the authorities before cited. The demands against John G. Winter for the breaches of trust are essentially of the character of damages. If an action at law could be maintained against him, it could only be an action on the case. There is no pretence that he has any property or assets of the Bank, on which complainants have any lien or trust created by contract, or by operation of law. None such is specified, nor is the bill filed to enforce any such lien or trust on property of the Bank. It is filed to make him personally liable as a trustee of the complainants, or as a trustee of the Bank for his acts of bad faith, to whom by the rights of subrogation the complainants have succeeded. The vagueness, uncertainty and generality of the allegations as to the conduct of the

Winters are fatal on demurrer.—See Story on Plead., §§ 241, 242, 243. The bill should state, with accuracy, and clearness, and precision, the right, the injury and the relief sought. All the allegations of the bill as to the Winters, (giving the most favorable construction to them for complainants,) establish no more than that J. G. Winter and J. S. Winter & Co. are liable at law, personally, for this debt—in fact, that the debt is theirs—the bills of the Bank issued by them on their own account, and for considerations personal to them. No property or effects of the Bank are alleged to be in their hands, specified as charged with any trust; but they are charged with being liable, personally, because by the means aforesaid they have accumulated property, while the Bank and its creditors are losers. They cannot be made liable, personally, until the complainants have obtained judgment at law, and the legal remedies exhausted. Is there any personal trust or fiduciary relation between John G. Winter and complainants, or Winter & Co. and complainants? When did it arise, and from what transaction?

It is said, that it is a bill for discovery, and that this gives the court jurisdiction. But we say, it is not filed as such, but solely as a bill for relief as contradistinguished from a bill for discovery. But suppose the discovery given; the discovery sought, if given, would make the case stand as alleged in the bill; and still there would be no equity in the bill. The bill must make a case of equity and ask for a discovery, which, if given, would make out such a case. But this bill makes and asks for nothing which would make a case in equity. The bill is not in aid of any suit at law. The prayers of the bill, in connection with the facts, show that the pleader intended it not as a bill under general equity rights, but as resting on the statute of 1846.

As to J. S. Winter & Co.: They are not directors or stockholders, and are not charged even as occupying any confidential relation to the Bank. It is not charged that they were the agents of the Bank; and the argument as to John G. Winter applies with greater force as to them.

As to J. S. Winter: He is mentioned in the beginning as a party individually; but no process is prayed against him individually. Nor is any discovery sought from him, as such;

nor is any prayer against him; nor any process, in fact, issued against him. Simply stating fraud or trust, is not sufficient to give jurisdiction.—See Knotts v. Tarver, 8 Ala.; Colburn v. Broughton, 9 *ib.* 351.

As before stated, the bill is filed to recover on a bill of exchange for $20,000, and if this cannot be done, to recover on the bank bills given for it. So far as the Bank is concerned, this is merely a simple contract debt; a liability on the draft or on the bank bills. As to J. G. Winter and J. S. Winter & Co., or both, and their liability, as being in fact the Bank or placed in its stead, the character of the contract is not changed. If they are liable, it is a liability to pay a simple contract debt of the Bank, for the payment of which their responsibility grew out of their conduct. All the fraud, breaches of trust to the Bank or stockholders, use of the bank bills, &c., are simply the statement of facts, from which a liability on the part of the Winters to pay this simple contract debt of the Bank is deduced. All that is alleged cannot make them more liable to pay this debt, than if they were parties to the bill of exchange. No trust of exclusive or concurrent equity jurisdiction is charged. The complainants cannot, therefore, go into equity until they have exhausted their legal remedies, unless by some statute giving jurisdiction to the Chancery Court in some mode not known to the common law. If the complainants seek to make J. G. Winter or J. S. Winter & Co. liable, as holding property which a court of equity regards as the property of the Bank, held in trust for the benefit of the creditors of the Bank, then the proceeding is on the ground that this trust property shall be held liable to the payment of the debts of the Bank. It is not on the ground that the debt sought to be recovered is the debt of John G. Winter, or of J. S. Winter & Co., and the property held by them, although they may hold the legal title, is regarded as the equitable estate or assets of the Bank, as to its creditors. If so, what is the remedy of the creditors? The universal rule, says Judge Dargan, in Sanders & McLaughlin v. Watson *et al.*, *supra*, is that the creditors must exhaust their legal remedies before equity will or can take jurisdiction, unless some lien or trust exists, or unless some statutory provisions authorize it.

All the alleged violations of the charter of the Bank by J. G. Winter, or J. S. Winter & Co., by which penalties have been incurred under the laws of Georgia, or by which a liability to pay this debt under the laws of Georgia, or the violations of the laws of Alabama by which a liability to pay this debt, accrues, cannot give chancery jurisdiction. These liabilities are either penalties, or simple contract debts, or statutory debts; and courts of chancery cannot, in the first instance, take jurisdiction of penalties, or debts not reduced to judgment, &c. No personal trust, and no lien on any property to pay such debt, is created in favor of the complainants by the violations of the charter, the breaches of the trust towards the Bank, or its stockholders, the excessive issue of the bank bills, the issue of the bank bills and their use in Alabama, or the representations charged in the bill as fraudulent. All these facts are but reasons, at most, showing the liability of J. G. Winter and J. S. Winter & Co. to pay a simple contract debt, and furnish no good ground for a court of equity to interfere in behalf of complainants and compel the payment of such debt or liability, unless it was shown that complainants had exhausted their legal remedies. The bill shows no indebtedness of John G. Winfer or J. S. Winter & Co. to the complainants. The debt sought to be collected is that of the Bank of St. Marys to the complainants. This debt is evidenced, either by the bill of exchange, or by the bank bills given up to the Bank on the delivery of the bill of exchange. There is in the bill of complaint no charge of any debt or contract of John G. Winter or of J. S. Winter & Co. Then the whole grounds upon which John G. Winter is sought to be charged or made liable, are: 1st, that he had used (fraudulently) the bills or property of the Bank in his business, so as to make large profits, acquire lands, &c., to himself, and that the profits, lands, &c., must be held, in equity, as the property still of the Bank, as to the creditors of the Bank; and, 2d, that he is indebted to the Bank, by use of its property, or by use and circulation of its bills, without accounting therefor to the Bank; (and these are the grounds upon which J. S. Winter & Co. are sought to be made liable;) 3d, that he has violated the charter of the Bank by over-issues; and, 4th, that he and J. S. Winter & Co. have put in circulation

the bills of the Bank in the State of Alabama. Now, the first two grounds are only that the Winters, in equity, are liable to account to the Bank, and are, in equity, its debtors, so far as creditors of the Bank are concerned. As to these two grounds, there is not the semblance of indebtedness to the complainants. As to the third and fourth grounds, there is no pretence of a contract, either express or implied, with the complainants. If there is any liability on these two last grounds to the complainants, it grows out of penalties imposed by the statutes of Georgia and Alabama. A court of equity can never be invoked to enforce a penalty, until judgment at law has been obtained and the legal remedies exhausted.

It necessarily follows, from these positions, that there is no equity in the bill of complaint, independent of the statute of 1846, against J. G. Winter and J. S. Winter & Co. The counsel for the appellees have cited numerous cases in support of the general equities of the bill, independent of the statute of 1846; but, when carefully examined, they all support the position here maintained. When the charter of a corporation has expired, and the stock and other property have been divided amongst the stockholders of the corporation—when, in other words, the corporation no longer has a legal existence, a bill may be filed and maintained against the stockholders by simple contract creditors of the corporation, to have payment out of the stock and property thus divided; because there can be, under such circumstances, no legal remedy against the corporation, and the property thus divided is held to be a trust fund to pay the debts of the corporation. 15 Mass. 505, 522; 16 *ib.* 9, 12, 13, 15; 3 Mason 308-10-11-12. In the last case (from 3 Mason) the decree was, that the stockholders should pay in proportion to the amount received by each. The following cases cited by the counsel for the appellees, viz., 5 Hamm. 162; 3 Louis. 568; 2 Johns. Ch. Rep. 385-89; 4 B. Mon. 91-96; 10 Monroe 84; 5 Paige 607; 3 *ib.* 222; 20 Eng. Ch. 428; 29 *ib.* 180; 16 *ib.*; 2 Atkyns; 2 Story's Eq., § 1252,—all hold that the legal remedies must be exhausted against the corporation, before equity will take jurisdiction in favor of creditors. The case in 3 Paige holds, that the stockholders may file their bill against the directors for

fraudulent or gross mismanagement of the funds of the corporation. Why? Because there was no legal remedy of which the stockholders could avail themselves: and because, as to them, there was a trust from the directors. The portion of the opinion relied on in 2 Johns. Ch. 384, was a *dictum*, and was spoken generally, and is no authority.—5 Paige 607. In this case, a judgment had been rendered against the corporation. Moreover, under the charter, a creditor at large could sue.—*Ib.* 608-612.

As to the equity under the statute of 1846:

1. As to the Bank of St. Marys: The charter, which is made a part of the bill of complaint, shows that the Bank is not liable for the payment of the draft or the bills for which it was given. The bill of complaint does not allege that the draft or bills were signed by the President, and countersigned by the cashier, as required by the charter. The allegation of liability by the Bank to pay the draft or bills, is not a statement of a fact, but is simply the statement of a legal conclusion. The statute of 1846 requires that there must exist and be distinctly charged in the bill, and sworn to as charged, an indebtedness to the complainants.—See Statute, p. 17, (Acts 1846); see, also, McGown v. Sprague, 23 Ala. 524.

2. As to J. G. Winter and J. S. Winter & Co.: Under the statute of 1846, there is no such indebtedness of John G. Winter, or of J. S. Winter & Co., to the complainants, as to authorize a court of chancery to issue an attachment against them, or either of them, as primary debtors to the complainants. The act requires that the indebtedness shall be to the complainants, and must be sworn to exist as charged in the bill of complaint. There is no affidavit setting forth any indebtedness of J. G. Winter, or J. S. Winter & Co. to the complainants. Without such allegation in the bill, and without such affidavit, the Court of Chancery has no jurisdiction against them as primary debtors.—See McGown v. Sprague, 23 Ala., *supra*. If no decree can be rendered against the Bank, the debtor of complainants, under the facts of the record, (which is hereinafter further considered,) no decree can be rendered against the Winters as debtors of the Bank, or as holding property of the Bank. But even if a decree can be rendered against the Bank, still, no decree can be rendered

against J. G. Winter and J. S. Winter & Co. in their capacity of garnishees, first, because they deny having property of the Bank in their possession; and, secondly, because they deny any indebtedness to the Bank, except by such commercial paper (not due at the time of the decree) as is not subject to garnishment by the act of 1846. (See last section of the act.) These denials in their answers, as garnishees, are not controverted by the complainants on oath, (in analogy to such proceeding at law,) nor by replication, nor by proof.

As to the plea of John G. Winter: There are two pleas, one to the original bill, and one to the bill as amended—both the same in form and substance. They deny his residence in Georgia, and aver his residence in the State of Alabama, and he pleads this fact: 1st, to any matter by which it is sought to charge him as liable directly or primarily on the draft; 2d, to any matter by which it is sought to charge him as liable on the consideration of the draft; 3d, to the matter by which it is sought to charge him on account of his being a stockholder in the Bank, and the issuance of the bills of the Bank in the State of Alabama; 4th, to the matter by which it is sought to charge him on account of the excess of the debts of the Bank over the amount allowed by the charter; 5th, to any matter in the bill by which it is sought to charge him directly. These pleas were filed without exceptions, and no motion was made to strike them from the file, or to disallow them. We admit, that if the bill had been filed on the equities of the complainants against John G. Winter as they existed independent of the statute of 1846, and afterwards an attachment had been prayed and obtained as ancillary to the original bill, then the denial by Winter of his non-residence, and a plea of his residence in Alabama, though sustained by proof, would have the effect only of dissolving the attachment, and not dismissing the bill as to him. We have already discussed the equities of the bill to some extent, and (to our own satisfaction, at least,) shown that no right of proceeding against Winter existed, unless under the act of 1846. The statute of 1846 gives jurisdiction of the non-resident, solely on the ground of non-residence, indebtedness to the complainants, and that such non-resident has real or personal property of legal or equitable nature, or choses in action,

within the State of Alabama. There are three things necessary to give jurisdiction against the non-resident: 1st, non-residence; 2d, indebtedness to complainants; and, 3d, that the non-resident has property of some character, within the State. The attachment is the leading process in the cause, and the equity of the bill—that is, the right to call upon the Court of Chancery for relief against John G. Winter—is based upon his non-residence, and cannot be sustained without such allegation. All the aspects of the bill show him to be liable in a court of law. The representations about the draft being met, his being a stockholder and issuing the bills in this State, his being one of the board of directors and permitting an excess of debts over the amount allowed by the charter, create legal liabilities only. The Court of Chancery can take jurisdiction of legal liabilities, only when some other fact supervenes; as in this case it is alleged, that John G. Winter resides out of the State, and without this allegation the court had no jurisdiction. The act of 1846 does not merely give attachment process, but confers jurisdiction in a class of cases in which, before that statute, the Courts of Chancery had no jurisdiction whatever, until the legal remedies were exhausted. A suit in this court could not be commenced on any of this class of cases in any other mode than by attachment.—The jurisdiction of the court depends on this process, and will be defeated unless this process is executed by a levy.—The non-residence of John G. Winter, being a fact essential to the jurisdiction of the court under the statute, was necessary as an allegation of the bill, and as such was averred and required proof. John G. Winter had the right to controvert this fact, and prove that an essential ground of the complainants' right to the aid of the court did not exist.

If it be said that he could not make this defence by plea alone, but must answer, we reply that no objection was ever made to the mode of defence, even at the hearing. This, too, was an attempt by the complainants, not only to commit a wrong against Winter, but to perpetrate a fraud on the court, by averring, as a fact, that which was false, and without which averment the court could not take cognizance of the cause. If the fact of Winter's residence in the State had appeared in the bill, the objection to the jurisdiction could have been

made by demurrer alone, or by a motion to dismiss for want of equity. When the objection does not appear in the bill, it must be made by plea. That this was an attempt to commit a fraud on the court, and that the plea was not an improper mode of defence, we refer to a case similar in principle.—Bentley v. Cleveland, 22 Ala. 814.

The statute allowing attachments at law did not confer a new jurisdiction, but gave an additional remedy; and before the passage of the act the defendant might contest the ground on which the attachment issued and defeat the action. He was not required to answer the declaration. In the courts of the United States, a defendant may deny that the plaintiff resides out of the State. A defendant in chancery may surely plead to the jurisdiction, without being compelled to answer the bill; and as no exceptions were taken to the plea, it was admitted as a full answer to the bill if the facts were true.—The law, especially as it is administered in this court, abhors circuity of actions. If the plea is true, this court will not permit the complainants to triumph in the success of their fraud both on Winter and the court, and turn him around for relief to his action at law. This, however adequate it might be for his redress, would be no vindication of the court from the fraud on its jurisdiction, and a party is never permitted to take any benefit from his own wrong, fault or negligence. On the defence at law, see following cases: Brown v. Massey, 3 Stewart 226; Mantz v. Hendly, 2 Hen. & Munf. 312; 2 Caines' R. 318; 2 Kent 323.

The only cases denying this doctrine, are O'Neal v. Owens, 1 Hay. 365, and Middlebrook v. Ames, 5 Stew. & Port. 158. The first is a *nisi prius* case, and the latter did not decide it. The question was considered, but was not a point decided, and is a *dictum* only by Judge Saffold; while opposed to his opinion is that of Judge Taylor, who entirely sustains the New York and Virginia cases. The plea by Winter is a plea to the jurisdiction, both in form and substance; it is in form a plea: the conclusion is a prayer that the court will not take jurisdiction as to him. At law, the beginning and conclusion of the plea determine its character; in chancery, the substance, and not the form, is regarded. The plea was a full answer to those parts of the bill by which a recovery was

sought on the bill of exchange or on any ground upon which he was legally liable.—Bentley v. Cleveland, *supra*.

This plea was sustained by the evidence. It is clearly shown that for a long time before the commencement of the suit he had ceased to reside in Georgia, had sold his residence in Columbus, and was living in the State of Alabana, claiming it as his residence. It is supposed by the adverse counsel, that the failure to establish his residence in the county of Montgomery is a failure to establish the plea, inasmuch as the averment was that he resided in that county at the time of filing the bill. While we admit, that probably he could establish his residence in the State only by proving his residence in some particular county, yet he is not held to prove his residence in Montgomery county, because he alleged that as the place of his residence. The issue was not as to the county in the State where he resided, but was as to the State where he resided. The allegation as to the county was surplusage; strike it out, and the plea is good. The evidence showed his residence to have been in Coosa county.

It is insisted, however, that John G. Winter is estopped from denying that he resided in Georgia, because he held himself out to the world as the president of the Bank; and the charter requires this officer to be a citizen of that State. We are of the opinion, that he would be permitted to deny that he was the president of the Bank, or acted as such, in a suit brought to charge him in that character for any act done by him, unless it was alleged and proved that the party seeking to charge him acted on the faith of such declaration, and thereby acquired a right of action against him. But there is no allegation in the bill of any declaration by Winter, or any act of his, relating to his place of residence, on the faith of which the complainants relied and acted, so as to have acquired a right of action against him. The case relied on by the adverse counsel, from 2 Conn. 223, only sustains the general doctrine; there the party held himself out as owner, and thereby induced others to deal with him in that character.

The decree *pro confesso* against the Bank is full of errors. We insist, that the order of publication must be in conformity with the rules of practice, and the requirements of the act of 1846. The Bank cannot be brought into court by a defective

order, although its terms are complied with; nor can it be brought into court by a proper order of publication, without there is actual publication in compliance with the order. The decree *pro confesso* must set forth the order, and the facts which constitute a compliance with the order. The rules require publication for four consecutive weeks, and that a copy of the order should be sent by mail to the principal officer of the corporation, when it is a foreign one. The order is defective in both these particulars. It is a necessary requisite that the order should be for four consecutive weeks, and that the publication should conform to this requirement, because the rules intended it to be for four consecutive weeks, and publication might be made for four weeks but not consecutively. It is also as necessary that the order should require a copy to be sent to the principal officer of the corporation, as to be sent at all. Domestic corporations are made parties in suits, not by service on the corporation, for that is impossible, but by service on the person whom the law regards as principally representing the corporation; and it must in all cases be proved that the person upon whom the service was effected was the principal officer of the institution, or the one whom the law regards as representing it. This rule is not an useless one, but substantial and important.—Lyon v. Lorent, 3 Ala. 150.

The decree neither conforms to the order, the rules of practice, nor the statute of 1846. It recites that the terms of the order having been fulfilled as appears by the affidavits in the cause. The affidavits, however, cannot be looked to, even to sustain the decree.—Hamner v. Mason, January term, 1854; Bloodgood v. Hartley, 16 Ala. 233; Butler v. Butler, 11 *ib.* 668. Neither do the affidavits, when referred to, show a compliance with the order. The decree does not recite the facts, but gives the legal conclusion, and refers to the affidavits for the facts on which this conclusion is founded. The affidavits refer to the order for what was done, and say it was done in pursuance of the order. The decree might just as well have said, "the order having been complied with in all its terms, it is therefore ordered," &c. The whole is going round in a circle. Elliott v. McLelland, 17 Ala. 206. The omission in the decree to show, by the facts, a compliance with each or any term of

the order, is as fatal as if the record showed that no part of the order was complied with. The publication brings the party into court; he is not in court until the end of the four consecutive weeks of publication. By the order, the publication is to be commenced within fifteen days after the date of the order; the rule requires it to be done in forty days; neither the decree nor affidavits show the day on which the publication commenced. If we can refer to the affidavits, it appears to have commenced within fifteen days after the date of the order, which was the 2d of August. If the publication began on the 10th of August, eight days after the order, and continued for four consecutive weeks, the time expired on the 6th September. The Bank, if everything else was regular, was not in court until that day, and then only by constructive service. We cannot presume it was in court at an earlier day. There is no definite day on which we can presume it was in court, unless we compute the time of publication from the 17th of August, the 15th day after the date of the order. No intendments are made to supply the defects of the record in such cases. If the Bank was then regularly in court on the 6th of September, within what time must it answer? We think it is entitled to thirty days after service, whether the service be actual or constructive. It was never intended to apply to parties served constructively, a more rigorous rule than to those having actual notice.—Code, 5th rule, p. 718; *ib.* 10th rule, p. 718; *ib.* 40th rule, p. 722.

The act of 1846, section 5, requires a publication of the substance of the bill. No order to that effect is made, and the decree does not show that it was done. The publication, without stating the substance of the bill, is nugatory.—See Act of 1846, § 5, p. 17.

These defects are supposed to have been cured by the decree *pro confesso nunc pro tunc*, rendered by the chancellor:—This decree was rendered in vacation, after the hearing, and on proof made in vacation, and without notice. These facts take this cause out of the rule laid down in 2 Ala. 415, a case which cannot, on principle, be sustained. Amendments of judgments must be made on matters *quasi* of record, at least. It is true that a sheriff may amend his return after final judgment; but there is no analogy between the act of the court

and the act of the sheriff: the latter acts on the responsibility of answering in damages to any one who is injured by a false return so made. It is a mere ministerial act. In the other case, it is a judicial power, and this cannot be exercised, unless on some matter of record in the court, or *quasi* of record. When a writ against two has been returned executed on one only, and a judgment has been rendered against the one served, as shown by the return, can the sheriff, at a term of the court subsequent to that of the judgment, amend his return showing service on both, and can the plaintiff then amend his judgment *nunc pro tunc*, and take it against both, without notice to the one against whom no judgment had been first taken? If he was a surety, and had been discharged by some act of the plaintiff, he has had no opportunity of making his defence. The decree *nunc pro tunc* is not upon the minutes, but is embodied in the final decree. It is also fatally defective. It does not show a compliance with the act of 1846, as to the substance of the bill, or with the order of publication, or with the rules of practice. These two decrees *pro confesso*, the one made by the register and that by the chancellor, are separate and distinct: each must be complete within itself: neither can be aided by the other. The chancellor's decree does not show the terms of the order, or that there was any order of publication. It says, "publication against the Bank of St. Marys was made by publication," we ask by what publication, or by the publication of what? Is it of the order? The decree does not say so, nor can this court say so, because nothing can be taken by intendment; but if it did refer to the order, we have already seen that it was defective, and there was no order *nunc pro tunc*, by the chancellor, amending the order of publication. This decree also says "a copy thereof," &c. A copy of what, we ask? Was it a copy of the publication? There was no copy sent to the principal officer of the corporation. There was no publication of the substance of the bill. The decree says, "having posted, &c., within the time prescribed by law, and the rules of this court;" this is not a statement of fact. The rule on these points has all the strictness applicable to a plea in abatement. The statement must exclude a conclusion.

It is thought by the counsel for the complainants, and also by the chancellor, that these errors against the Bank have been cured by its appearing in court by counsel. If there has been an appearance in the cause by counsel for the Bank, it will not be permitted to urge the above objection; but we look in vain on the record for evidence of such an appearance. A conclusive answer to this view is, that no decree *pro confesso* has been rendered on their appearance, but basing his decree on the decree *pro confesso* of the 4th of October, the chancellor has conclusively answered what was in fact a mere suggestion of his mind. After the decree *pro confesso* the Bank was in contempt, and could not appear in court for any purpose, except to purge the contempt; and the only way in which that could be done was by filing a full and sufficient answer. On the 21st of January, 1853, in open court, on motion of defendants, it was ordered that the answer of the Bank be published. This was taken under a commission issued on the 13th of September, 1852. On being published, it proved to be a plea of former recovery. A motion was made in behalf of the Bank on tender of this plea, to set aside the decree *pro confesso*. This motion was denied, on the ground that it was not a full answer. To this plea counsel's name is signed, and the plea appears in the record, with the motion made and the action of the court thereon.—It may be regarded as part of the record, but it is no part of the pleadings in the cause. This is all the evidence of an appearance by the Bank. There was a decree, or what was treated by the chancellor and Bank as a decree *pro confesso;* and to set it aside to enable the Bank to appear, application is made in September for a commission to take the answer of the Bank; in January following, on behalf of the Bank, what purports to be its answer is published, and on the publication the Bank asks to file, as its answer, what is in fact a plea, and to set aside the decree *pro confesso*. Everything that has been done by the Bank is to purge itself of the contempt, and to place itself in a position to appear by counsel in the cause. The motions made for this purpose do not cause an appearance by the Bank; otherwise the Bank was appearing, and was represented by counsel in court, and had the right to make any objections and to be heard on the hearing, although

the decree *pro confesso* was in full force, as decided by the chancellor. This is an anomaly in practice.

The argument on this point is reduced to this: That the exclusion of the Bank from an appearance to the cause, really worked an appearance. When the Bank asked to be let in to defend and it is refused, it is now told that it was thereby in court. We think this point does not rest alone on principle, but is supported by authority.—Nabors v. Nabors, 2 Port. 162; Lecatt v. Salle, 1 *ib.* 287; 8 *ib.* 467; 3 Stewart 480. The Bank did not cross the interrogatories or take any part in the introduction of testimony; the defendant's solicitors who signed the interrogatories must be considered the solicitors alone of those who had the right to file them; the introduction of the record from the Inferior Court of Muscogee county, Georgia, cannot be intended as the act of the Bank; it had no right to introduce any testimony, but especially testimony relating to no issue. These records were irrelevant and should not have been admitted. An appearance is an act—an entirety. Unless some one of the various things done by the Bank, constituted of itself an appearance, all of them together do not make an appearance. In Wilkins v. Hall, 4 Porter 245, the *scire facias* was executed on the representative; he then appeared in person in court, and asked time. The case in 6 Peters 327 only decides that a demurrer filed and signed by counsel, is an appearance, if so intended by counsel. The case in 4 Johns. 99 decides that an answer filed, and orders taken under it, is an appearance. In this instance the Bank filed neither demurrer, plea, nor answer, and never appeared to the cause by counsel. A motion to set aside the contempt by filing the plea was all that was done, and this was no appearance. The Bank has the right to make this objection here—it had no opportunity of doing it before, and unless now heard, the error could not be reached.

There was error, also, in the refusal to permit the plea to be filed. It was a plea of matters that had occurred since filing of the bill, and since the last continuance of the cause. It should have been allowed, although the decree *pro confesso* was not set aside. But we have seen that the decree *pro confesso* was wholly void, and the chancellor had no right to disallow the plea at the time, and in the manner determined

by him. It should have been filed, with leave to the plaintiff to except to it, or with such order on the same as might be made under the rules of practice. The chancellor did not pronounce upon the goodness of these pleas; he refused to consider this. If necessary to examine this question, we insist that the defence set up by the Bank was good. The pleas are two: one to all the grounds of relief stated in the bill, the other to the recovery sought on the draft. The only liability of the Bank was upon the draft, or upon the bills. If the suit at law was upon the draft, and a judgment was rendered for the defendant, the plaintiffs could not turn round and sue the Bank on the bills. This judgment was conclusive as to all matters which were involved in the suit, or might have been litigated under it, and conclusive as to all the legal consequences of the judgment.

The chancellor had no authority to render the decree in vacation. The record shows that the cause was heard at the April term, 1853, of the court. The decree itself, and the certificate of the register, prove it was rendered in August. The only authority to render decrees at any other time than the term at which the cause is heard is to be found in the statutory law.—Clay's Digest § 40, p. 352. Chancellors are expressly required, by the terms of the act, to render their decrees in writing at the term of the court when the cause is heard, "unless in weighty and difficult cases, in which he may be indulged to the ensuing term." There is no entry on the minutes of the court, that this cause "was weighty and difficult, and therefore the chancellor was indulged to the ensuing term to render his decree."

Another objection to the decree is, that Farley and Moulton were necessary parties. They were the partners of John Henley. This objection was taken by the answer. The complainants reply that these persons were dormant partners, and not necessary parties. We think this reply is not sufficient on the hearing or in the argument; the plea alleges that these persons were partners of John Henley and joint owners of the draft. The bill is not amended so as to show that they were dormant partners, and the question of the character in which they stood in the partnership, was not put in issue as the pleadings stood: there was no replication to

the plea ; and the issue stood, were they partners of John Henley, and interested in the subject-matter of the suit. If to a bill filed, the defendant pleads the statute of limitations, the bill must be amended so as to put in issue some fact which takes the case out of the statute ; otherwise, the only issue on this matter is, whether the time had elapsed since the right to sue accrued. So here, the complainants could not prove these were dormant parties, when that was not the matter in issue.

But were they dormant partners ? Such are defined to be those whose names and transactions as partners are professedly concealed from the world.—Collyer on Part., § 4, p. 3. The testimony abundantly proves that the names of these persons, and their transactions as partners with John Henley, were not professedly concealed, but avowed and published to the world, and that they were the active members of the firm in transacting its business. The cases in 2 Harris & Gill, and 5 Cowen, which maintain that a partner is dormant, unless his name is mentioned in the firm, or embraced under general terms, cannot be supported. If his name is embraced in general terms, this does not point out and identify him as the person meant—there may be many of the same name in the same place. This rule is too uncertain, and the definition of Collyer is correct ; and it must follow as a conclusion, that one whose name and transactions as a partner are not professedly concealed from the world, is not a dormant partner. It has been held that dormant partnerships are confined to trade and commerce, and this is the business of exchanging commodities, or buying and selling commodities. It appears from the testimony that their firm was engaged in the business of dealing in exchange, and money brokers. If so, then there could be no dormant partnership.—Pitts v. Waugh, 4 Mass. 424, 426 ; Smith v. Burnham, 3 Sumner 435, 470 ; 3 Kent, (5th ed.,) n. a.

It is insisted by the complainants, also, that they being the holders of the draft, endorsed in blank, might fill up the blank with the name of any person, and sue on it in the name of such endorsee. Admitting this to be true, this blank has not been filled up with the names of complainants. We contend, if it had been filled with the name of John Henley

and the other complainants, on proof that Moulton and Farley were partners with John Henley under that name, and as such were joint owners of the draft, the law would put the title and interest which passed to the John Henley endorsee, in the firm, and hold the endorsement to be to the firm; and the failure to make such endorsement can make no difference, unless it is in favor of the defendants. We admit, that if the owner of the draft has it in possession, he may sue on it in his own name without filling the blank, or he may fill the blank with the name of any person he chooses and then bring suit thereon. But if the blank is not filled, and the suit is in the name of one who is not the owner, the suit would be defeated. This principle is plainly deduced from Bancroft v. Paine, 15 Ala. 834. The other cases only hold that the party in possession may fill up the blank, and if on the trial there is no evidence to rebut his ownership, he is presumed to be the owner, and being so, it need not be actually filled up.—Nor is this case within the exceptions in 15 Ala. Complainants are not shown to be agents to whom this draft was transmitted for collection. But however the law may be on this point, as regards the parties to the draft, it does not authorize a suit against persons not parties to the draft by any one, except those who are interested in the subject-matter of the suit. Neither of the Winters is a party to the draft, and cannot be made liable thereon, by a suit directly on it; and when it is attempted to charge them on the subject-matter of the bill, all who have a real interest in that matter must be made parties. This is true also, as to the Bank, on that part of the bill by which it is sought to charge the Bank on any other account than the draft itself. To charge the Bank on this suit, the bill should have been dismissed as to every thing, except the allegations as to the draft.

The decree against J. S. Winter & Co. cannot be sustained. The bill, in the commencement, states that the suit is against J. S. Winter. It expressly alleges, that the firm is located in Alabama, and that J. S. Winter resides here. No relief against the firm could be given under the act of 1846, and as debtors to the Bank or John G. Winter, no indebtedness in the answer is shown. The decree can only be sustained on grounds of general equity, and this view has already been

presented. The same specific relief is prayed as against Holcombe and the other garnishees. The same process is asked against J. S. Winter & Co., as against Holcombe and the other garnishees. The nature of the allegations shows that it was intended to charge them only as garnishees or debtors, or having effects of the Bank liable to seizure. The firm occupied no relation of trustee to any one, neither the Bank nor creditors; it was not a stockholder, could not be a director, and could not, under the charter, be liable. They are brought in as garnishees, and in no other character, and in that character alone can a decree be rendered against them.—Tillinghast v. Johnson, 5 Ala. 514. Their answer shows no effects or indebtedness, which can, under the law, be attached; their answer is not contested, and not disproved.

The decree of the chancellor, ordering the shares of John G. Winter in certain corporations to be sold, is wrong. The bill does not proceed against these, makes no allegation in regard to them; they are incapable of levy by the sheriff; and the power to decree a sale of any effects or property, depends on the power of the sheriff to levy. If the bill had specified these stocks, and prayed that they should be condemned to pay the debt, and a sale for that purpose, it would present a different question; but on the return of the sheriff, that he had levied the attachment on certain shares of stock—that he has done what is impossible—the decree orders the sheriff to sell what he has not in his possession.

But, if the decree is correct in every other respect, it certainly is erroneous in allowing damages on the bill of exchange. If the right to maintain the suit is founded on the bank notes, for which the draft was substituted, no statutory damages could accrue.

HILLIARD & THORINGTON, *contra:*

The case before the court is one of extraordinary character. The bill charges the Bank of St. Marys, John G. Winter, and Jos. S. Winter & Co., with fraud seldom equalled in the annals of banking; and the complainants insist, that the allegations of the bill are fully sustained by the proof exhibited in the record. The case of complainants rests upon the gen-

eral and ordinary jurisdiction of courts of equity, and also upon the act of 1846, which authorizes attachments in chancery. In either view, the Bank of St. Marys, John G. Winter, and Jos. S. Winter & Co., are liable for the payment of the bill held by complainants.

First: It is a well-settled principle, that the president and directors of a bank are bound to conduct its affairs in good faith for the benefit of the creditors and stockholders, and in accordance with its charter. If they violate its charter, and misapply its funds, they are liable as *trustees*, and become *individually* responsible to the creditors and stockholders of the bank. Those who enjoy a charter have extraordinary privileges conferred on them: they are exempted by the act of incorporation from individual liability; but they forfeit these privileges, when they violate the provisions of their charter, and can no longer claim its protection; they then become personally liable as trustees. This principle is fully sustained by numerous authorities.—1 Edw. Ch. Rep. 513; 16 Eng. Ch. Rep. 52; 20 *ib.* 428; 29 *ib.* 180; 5 Paige 607-12; 4 B. Mon. 90; 5 Hamm. 162; 2 Atkyns 400; 2 Johns. Ch. 389; 6 *ib.* 160; 3 Paige 231; 3 Mason 308-13; 4 Leigh 233; 2 Lou. 568.

The strong allegations of the bill as to fraud on the part of John G. Winter and J. S. Winter & Co., are admitted, for their answers do not controvert these charges, but offer merely *technical* defences. The facts charged are within their own knowledge; they cannot be ignorant of them; and the allegations as to fraud and a violation of the charter of the bank under their control, are to be taken as confessed, for they decline to reply to them.—1 Story 172; 3 Bland 552; 7 Ala. 217. The allegations could not be denied, and they could not be admitted without exposing the parties to the stringent penal laws of Georgia.—See Prince's Dig. 633, §§ 37, 41.

Independent of this confession of the charges of the bill, there is ample proof to sustain them. The charter of the Bank is found in Prince's Dig. 134. The bill charges, that while the Bank was by its charter located at Columbus, Georgia, its chief seat of operations was at Montgomery, in this State, under the management of John G. Winter and Jos. S. Winter & Co.; that John G. Winter was president, and conducted its

concerns as he pleased, subject to no direction of the Bank; that hundreds of thousands of dollars of the bills of the Bank had been issued for the first time by that firm at Montgomery; that no election of directors had been known to have been held for several years, and that no board of directors had assembled for more than two years; that John G. Winter, as president of the Bank, used its bills without limit, and without accounting to the board, and that the Bank was used as a mere device to enable Jos. S. Winter & Co. to carry on banking operations within the State of Alabama, against its policy and contrary to its laws, solely for their own advantage, and that they might escape personal liability in their transactions; that by these means John G. Winter and Jos. S. Winter & Co. have accumulated a large property corresponding with the issues made; that the Bank had failed, was insolvent, and worthless; that when the draft of $20,000 was drawn by the Bank on Holcombe, and handed to the agents of complainants, both John G. Winter, president, and George W. Winter, cashier, knew that Holcombe had no funds to pay it, and that in the meanwhile Jos. S. Winter & Co. withdrew all the funds standing in their name in his hands; that Jos. S. Winter & Co. were attempting to buy up the bills at a depreciation; that John G. Winter and the firm of Jos. S. Winter & Co. are responsible for the debts of the Bank, because they have absorbed its capital, knew that the Bank had a fictitious basis, and put the bills in circulation knowing that the Bank would stop payment.

All the above charges, by failing to answer, they have admitted to be true; but to establish the strength of the case made out by the complainants below, we briefly refer to some of the facts proven, the mere statement of which establishes their right to recover, &c. It appears that the Bank of St. Marys was at Columbus, Ga.; Jos. S. Winter & Co. at Montgomery. John G. Winter gets control of the Bank of St. Marys, becomes its president, and by a subsequent act of the Legislature changes its location from the distant point of St. Marys to Columbus, the theatre of his own operations, and further has the former number of directors of seven reduced to the smaller number of five. This board of directors was made to consist of himself and his two sons, Joseph and George,

his co-partner in the flour-mills and confidential agent, L. B. Moody, and Dr. Wildman. Out of this board, three of the number formed a quorum, which, if occasion required, might at any time consist of the father and his two sons. David Waugh proves, that the firm of Jos. S. Winter & Co. was established in Montgomery in 1845, and this witness, also Barker, Cullom and Caldwell, all clerks of said firm, prove that Jos. S. Winter and L. B. Moody were for years citizens of Montgomery county. John G. Winter swears that *he* was a citizen of Montgomery, and his letter of the 26th June, 1850, was introduced to prove the fact.

Admitting, then, for the sake of argument, that John G. Winter is a citizen of Alabama, as well as his son Joseph, and his confidential friend Mr. Moody: it is, then in proof, that three of the five directors of said pretended Bank are citizens of Alabama, and were such a long period previous to the transaction on which the bill was filed. If we compare the facts and the law, we find that *three* of the five directors (a quorum) were not citizens of Georgia, but of Alabama: and that the charter of said Bank specifically required that "none but citizens of that State should be eligible as directors," &c., and a penal statute making the violation of any provision of such charter a high misdemeanor, punishable by imprisonment in the penitentiary, &c.—Prince's Digest, p. 134; *ib.* 633. It follows, then, as a legal conclusion, that there being only *two* directors of said Bank citizens of Georgia, said Bank was incapable of transacting business, that number being less than a quorum; that the pretended organization of the board of directors was a palpable violation of its charter; that an attempt so to direct and manage the Bank was a criminal offence; that, as it was impossible, under the charter and laws of the State, to carry on the operations of banking by such flagitious conduct, they (the directors) became individually liable for every act so performed, and cannot avoid it by interposing the subterfuge, that it was the Bank of St. Marys, and not John G. Winter, the president, and the firm of Jos. S. Winter & Co., that was liable. They were, under the proof, (admitting the claim of John G. Winter to citizenship of Alabama), for two years prior to the failure of the Bank, acting in violation of its charter and the laws of Georgia, using the Bank,

in the language of the bill, as a mere machine for their own individual benefit.

The parties defendant below were not only liable under the general principles of equity, but were expressly so under our statute, as follows: "Each and every person, who may be a partner, or stockholder, in any company, corporation, or unchartered banking association, shall be liable to the holder of any note, bill, bond or post-note issued, emitted, or put in circulation," &c.; "and recovery may be had before any court having competent jurisdiction."—Clay's Dig., 133, § 3. The facts bring the case clearly within the statute; and it must be remembered, the facts are not denied by the appellants. and, in the language of the chancellor, "the proof fully sustains, and in one or two important points, connecting the Winters with the Bank, and showing its irresponsible management with a view only to their own profits, goes even beyond the strong allegations of the bill."

The testimony of Moulton is conclusive upon the question of fraud on the part of the Bank as managed by the Winters, and their direct connection with it, in the suit at bar. He proves positively that a majority in amount of the twenty thousand dollars of the bills of the Bank of St. Marys was put off by Jos. S. Winter & Co. upon John Henley & Co., at a small discount, for the bills of solvent banks, a few days previous to the failure of said Bank; and that it was for the identical bills so received from Jos. S. Winter & Co., and other bills of the Bank, that the said draft was given.

Holcombe proves, that at the time the draft was drawn on him, John G. Winter, president, and Geo. W. Winter, cashier, knew he had no funds to pay it, &c.

The testimony of McArn connects L. B. Moody, another Alabama director, and the firm of Joseph S. Winter & Co., (embracing the other two Alabama directors,) directly with the fraud perpetrated in Wetumpka a few days prior to the failure of the Bank. He purchased the cotton at the request of Moody, and J. S. Winter & Co. paid for it in the worthless bills of the Bank. The consequent liability of directors taking such means with J. Henley & Co., and for the purchase of property on the eve of such a failure, requires no argument beyond the statement of the facts.

As a key, however, to the whole system, it is only necessary to advert to the testimony of Anderson, the superintendent of the business of Jos. S. Winter & Co.—the manner in which he states they received the bills of the Bank, viz., chiefly by the conductor of the railroad; that during the whole period he was in their employ, about three years, he does not remember, nor have any knowledge of, any notes, bills or bonds executed by Jos. S. Winter & Co. to the Bank, for any indebtedness, &c. The whole indebtedness and evidence thereof on the part of Jos. S. Winter & Co. to the Bank was limited, according to his knowledge, (and he was their superintendent,) to the books of Jos. S. Winter & Co; that the plan of settling balances consisted in the farce of making out accounts in April and October of each year, charging up the balances, and the *next day*, or a few days thereafter, entries were made on said books *reversing those previously made*. The system of book-keeping, it seems, was adapted to the peculiar transactions of the Bank and its Alabama coadjutors, and adjusted balances with wonderful facility and dispatch.

We next refer to the report of the condition of the Bank, as set forth in the exhibit made to the governor of Georgia, 31st May, 1851, being the last report so presented. The amount of deposits is $54,648 16, circulation $486,800—$541,448 16; the amount of assets $820,462 72; surplus after paying circulation and deposits, $278,914 56. Geo. W. Winter proves that the Bank suffered no serious losses after the above report. This report places the appellants in a dilemma, either horn of which, we contend, is an additional evidence of systematic fraud. If the above report is true, why was the draft not paid, and how could the Bank shut down on the public, and stop payment, with assets, according to the last report, (undiminished by subsequent losses,) amounting to a surplus of $278,914 56? If the Bank was not injured by bad debts, what became of the $125,364 81 in specie? of the $130,571 62 balances of banks? of the $352,729 82 exchange maturing? of the $101,482 76 notes discounted? Why did they not answer the interrogatories in the bill, which would have explained all these matters and things? The whole matter is solved by the evidence of Cullom, one of the clerks of Jos. S. Winter & Co. He testifies, that during the thirteen months

he was in the employ of Jos. S. Winter & Co., they issued of notes of the Bank of St. Marys from a million and a half to two millions of dollars.

The defendants are liable as *trustees*, for the amount of the bill of exchange which complainants hold; and the equity of the bill on general principles is clear. It is the peculiar function of a court of chancery to enforce trusts. The complainants do not come into court and ask for relief because they cannot find any of the property of the Bank, and therefore seek to subject the property of its directors, as the opposing counsel seem to think; but they insist that the defendants used the Bank "as a mere machine," misapplied its funds, and that they are directly liable to them for their debt, as individuals. The Bank is a non-resident, and that would of itself be a sufficient reason to allow the complainants to come into a court of chancery and treat the defendants as trustees holding their funds, without first obtaining a judgment against the Bank. A holder of a note endorsed may sue the endorser without proceeding against the maker, if he be a non-resident.

Second: The defendants say that Farley and Moulton ought to have been made parties to the suit. Now it is well settled, that the holder of negotiable paper may sue in the name of a person having no interest therein; he may be regarded as a trustee.—Gage v. Kendall, 15 Wend. 640. It is no defence to an action, that the property of the note is in a third person; unless the possession is *mala fide*, and may work prejudice to the defendant, the latter is not entitled to be heard on the subject.—Guernsey v. Barnes & Graves, 25 Wend. 411; 2 Sandf. Sup. C. Rep. 188. Nor is it a sufficient objection that the plaintiff in the record is not the party beneficially interested.—9 Metc. 436. The holder of the paper has a right to write over a blank endorsement, &c.—11 Peters 84. It is the decision of our own Supreme Court, in Sawyer, adm'r, v. Patterson, that it is unnecessary to fill up the blank endorsement, even when the description of the declaration is that the note is endorsed to plaintiff.—11 Ala. 526. The statute of 1837 does not extend to blank endorsements. See, too, 15 Ala. 834. The principle applies to proceedings in equity, as well as at law. Our proceeding is in some sense a proceeding at law; we hold a negotiable paper, and seek to collect it; it does

not lose its commercial character because we avail ourselves of a remedy in chancery. Besides, there were no equities between Moulton and Farley and the defendants; and if there had been, the complainants would have represented them. They were dormant partners, and need not have been joined.—Collyer on Part. 4; Story on Part. 380; 3 Taunt. 34; 2 Verm. 65; Desha, Smith & Co. v. Holland, 12 Ala. 513.

Third: John G. Winter answers that he is a citizen of Alabama. The allegations of the bill as to the non-residence of Winter are not traversable. The complainants having made the required affidavit, and given the necessary bond, are entitled to the extraordinary process of attachment, of which they cannot be divested. Bouvier defines an attachment to be "a writ authorizing the officers of the law to seize the property of the defendant." This is an attachment, whether granted by a court of law or equity. Then the decision of our Supreme Court in Middlebrook v. Ames, 5 Stewart & P. 158, and our statute of 1837, affirming that decision, must govern the attachment writ granted in this case. The statute applies to all attachments. The practice in our courts of law and of equity ought to harmonize. See the reasoning in the case of Kirkman *et al.* v. Vanlier, 7 Ala. 227. The statute of 1845–6 grants an attachment in chancery. Even if he could traverse the grounds of attachment, as to his non-residence, the proof is against him. He cannot do this—he must rely upon his bond if he is wronged; but if he could, the proof is decidedly against him. Winter (John G.) answers that he resides in Montgomery. Even his own witnesses do not say that. Moody, his confidential agent, says either Montgomery or Coosa. His letter to his *son Joseph* is adduced—carefully sealed up by a notary and laid away—and that some two years or more before the failure of the Bank, while he is acting as its president, under its charter, and in the face of the penal laws of Georgia. J. G. Winter was actually in Columbus at the time the bill of exchange was given to complainants, when the Bank suspended, and when the bill was filed and attachments issued, acting as its president; and we had the right to treat him as a citizen of Georgia.

Fourth: A judgment is set up which was obtained in Georgia: 1st, the Bank no right to offer the plea—it was in

contempt; 2d, the answers of defendants nowhere allege the judgment, and of course they can offer no such proof; 3d, the judgment was not final, and of course could not harm defendants, even if the plea was improperly overruled. It would be a wrong without an injury.—Prince's Dig. 426; 2 Kelly 339; 4 Ala. 9.

Fifth: We rely too upon the statute of 1845–6. Our bill rests finally upon both grounds. The equity of the bill is clear. The statute of 1845–6 is ample. It authorizes a levy upon equitable interests, &c.

Sixth: As to the decree being rendered in vacation: The statute clearly authorizes it; the chancellor has until the next term, and was prepared to render his decree earlier.—Besides, by the agreement of counsel, the decree was withheld, and defendants' counsel actually requested the chancellor to delay it until they could furnish their brief. This cannot now be set up as error.

Every consideration, legal, equitable, and moral, is in favor of the complainants. The proceedings of the defendants are marked with fraud: they owe the money; they have misapplied the funds of the Bank, and appropriated them to their own use; and they merely criticise the regularity of some of the forms of the court. The country ought to be able to look with confidence to the courts, especially to the highest tribunals, and repose with security upon their decisions, satisfied that they will be governed by manly sense, and by an unswerving regard to right, while they respect necessary forms.

P. Hamilton and D. Chandler, on the same side:

I. As to the defence set up by the defendants below:

1. They aver that John G. Winter is a resident citizen of Alabama, and that fact is sufficient to defeat the suit as to him. The suit was begun under the law authorizing attachments in chancery.—Pamph. Acts 1845–6, p. 17. That act is modelled upon the system authorizing attachments at common law: so far as the organization and practice of the courts permitted, the systems are the same. The non-residence of a debtor, when certified by affidavit, authorizes attachment from either court. The abuse of the process, in either case, is guarded

against by bond and security: the levy upon property by the sheriff, its sale, the issue of garnishment, and similar incidents, attach to each system.—Pamph. Acts 17; Clay's Dig. 61. Under the earlier laws on this subject, it was indeed held, that the averment on which the attachment issued, might be traversed by the defendant.—3 Stew. R. 226. This decision was not unanimous, and was soon overruled.—Middlebrooks v. Ames, 5 Stew. & P. 158. This last decision was made at June term, 1833; subsequently, in 1837, the attachment law was amended, and the right to traverse was specifically denied: being a legislative approval of the decision of this court. The case, (5 Stew. & P. 158), then, becomes an authority for the construction of the act of 1846, and the traverse of the allegation on which the attachment issues, (in this case the non-residence of John G. Winter,) is not admissible. The defendant's remedy is on the bond which the plaintiffs have given.

In this view, the pleas and answers of John G. Winter, both to the original and amended bill, (for to both the answers are the same,) are inadmissible: they traverse an averment not traversable. The depositions offered by the defendants, were, for the same reason, objectionable,—they are confined to the point of non-residence. But, if material, the answers are not sustained. He asserts his residence to be in Montgomery county; the testimony, if admissible, shows his residence to be in Coosa county. The depositions of Joseph S. Winter, George W. Winter, and Moody, are inadmissible: they are stockholders in the Bank of St. Marys, and are charged with participating in the frauds alleged to have been committed in its management. They are incompetent from interest. The weight of proof is in favor of the non-residence of the defendant. It comes from old and well-known citizens of Montgomery; while that of defendant comes from his sons, and employees, his cashier, his partner, his agent, his bookkeeper, and his lawyer; and consists of his declarations, and a letter said to have been written, and which remains in his own custody or in such keeping that he can produce or suppress it; and the original of that has never been produced, even to the commissioner who took the affidavit of the witness. There is no proof of actual residence in Alabama. No

one swears to being at the house of John G. Winter in Alabama, or that he has ever seen it.—11 Ala. 698. The answer is disproved in any event; for not a particle of proof exists in the record, that John G. Winter ever resided at Montgomery. When there he was merely a sojourner, either at an inn, or at the house of one of his sons.

It may be that he had two domiciles: certainly one in Georgia, which the plaintiffs are justified in regarding as his residence. He had for years been a house-holder there, and engaged in agriculture, as well as in other business, located there; he held an official position under laws of Georgia, which those laws declared could be held only by a citizen of Georgia.—Prince's Dig. Laws Ga. 133. He is estopped from denying that he is a citizen of Georgia.—*Ex parte* Straffon's Ex'rs, 10 Eng. Law & Eq. Rep. 279; 2 Conn. R. 223; 18 Conn. R. 153, 443. He acted as President of the Bank St. Marys, and complainants were authorized to take it he was rightly so; and that involved citizenship in Georgia.—3 J. J. Marsh. R. 700. At the time the bill was filed, he was in Georgia, and actively engaged about the business of the Bank, as its president.

2. After the case was prepared for hearing upon the answers first filed, and the testimony all taken, the Winters obtained leave from the register to file an amended answer. This answer avers that Thos. Moulton and Jas. Farley were copartners with Henley, and interested in the bill of exchange sued on, under the style of "John Henley," and should have been made co-complainants. Was it error to proceed to trial without making them complainants? Appellees contend that Moulton and Farley were dormant partners. If dormant partners, though they might be proper, they are not necessary parties.—11 Ala. 603; 12 *ib.* 513; 4 Cowen's R. 717; 4 Wend. 628; Edwards on Parties, p. 46, § 24, p. 56, § 47; Story's Part. § 241, p. 374, n. 2; Story's Eq. Pl. § 241, n. 3; Coll. on Part. § 660-1, notes and authorities. The names of Moulton and Farley did not appear in the style of the firm, and there was no word of company attached to the name of John Henley, to indicate that others were concerned with him; they were dormant partners.—2 Har. & Gill R. 159, 171; 5 Cowen 534; Story on Part. § 80. In this case we have the assertion of

these defendants, that they did not know these parties were interested in the bill of exchange. As to them, then, Moulton and Farley were dormant partners, within the strictest letter, and should not have joined in the suit.—11 Ala. 603; 3 *ib.* 733; 6 Pick. 348.

Further, to obviate any objection of this kind, it is submitted, the endorsement of the bill of exchange may be filled up at any time before or after suit brought, to any party, and thereby a sufficient interest will pass to sustain the suit (11 Pet. R. 81, 84); and the filling up need not actually be made; it is sufficient that the right exists.—8 Ala. 628; 15 *ib.* 834, 838; 11 *ib.* 523, 527; and see 9 Metc. 434, 436; 15 Wend. 640; 25 *ib.* 411; 2 Sandf. S. C. R. 188; 9 Martin 344. And as to the right of the party who has thus undertaken to sue, the defendants have no concern.—9 Metc. 436; 2 Sandf. 188; 15 Wend. 610; 15 Ala. 839; 3 Madd. R. 97-8.

3. Another defence attempted to be made, is found in the pleading tendered in behalf of the Bank St. Marys, to-wit, that in a suit on this bill of exchange, in the name of John Henley, against the Bank St. Marys, in Muscogee county, Ga., a verdict was rendered in favor of the Bank. This attempted defence of the Bank is destroyed by the transcript of the proceedings in that case, introduced by the complainants. That transcript shows, that while such a judgment was in fact rendered, its operation as a judgment was neutralized by an appeal as provided by the laws of Georgia. The provision of the law of Georgia is found in Prince's Dig. 426. The operation of an appeal is to remove the whole cause to the appellate tribunal, with all its incidents: the former judgment has no force for any purpose (1 Bouv. Law Dic., tit. Appeal; 2 Gall. R. 230; Conkling's Adm. 835; 17 Pick. 142; 20 Pick. 510); and so is the law of Georgia.—2 Kelly's R. 329. The complainants have therefore overthrown the defence proposed to be made by the Bank, or in its name; so that, whether the chancellor erred or not, in refusing to receive that answer, it is shown neither the Bank nor any of the defendants have suffered any injury of which they can complain in this court: even if an error, it is error without injury. But it was no error. The bill was filed in April, 1852; the time to answer expired in June; it was extended by consent thirty days. A

decree *pro confesso* was applied for in July. The bill was amended, and publication against the Bank applied for in August, 1852. Decree *pro confesso* on the amended bill was obtained in October, 1852. On the 21st January, 1853, the pleas of the Bank, which had come in under a commission, were opened by order of the court, and the Bank by its counsel moved that the decree *pro confesso* might be set aside, and offered the pleas as a compliance with the rule of practice. The court will observe, that the paper tendered by the Bank consists of two pleas, averring in substance the judgment of the Inferior Court of Muscogee county, Georgia, as a defence to the bill: not a single allegation of the bill is answered; and the defence is offered solely in the form of a plea. It is the furthest removed from a full and complete answer, such as contemplated by the rule.—Clay's Dig. 351, § 39. A partial answer may, in some instances, be filed; but only in peculiar cases, where of necessity the complainant's suit must fail. But in no case, after decree *pro confesso*, can a mere plea setting up a technical defence, not favored by courts of equity, be received—22 Ala. 819.

II. As to the case of the complainants:

The case made by the bills original and amended, is entirely undefended, so far as merits are concerned. The defendants have chosen to rest upon such objections as they could pick up in the course of the suit; they have not attempted to shield themselves from the serious charges in the bill. As to them, by all the rules of equity pleadings, they stand confessed; there is not the first attempt at the denial of a single allegation in the bill. The proceeding was commenced under the act of 1846.—Pamph. Acts 17. The Bank is confessedly non-resident—is located in Georgia, and is indebted to citizens of this State. John G. Winter was also a resident of Georgia, or must be taken as such for the purposes of this suit. The other defendants are before the court, as garnishees of the Bank, or its debtors; John G. and Joseph S. Winter are charged as being immediately liable to pay this debt, by reason of their connection with the Bank in Georgia. It is contended, the bill is clearly sustainable under the statute authorizing attachments in chancery. The complainants go further, and assert that their case also falls within the ordi-

nary jurisdiction of courts of equity; and that they are entitled to decrees against the Winters individually, without reference to the mere fact of their being debtors of the Bank; that the Winters are debtors of the Bank, and should be so held in a court of equity; but that, in the eye of the law as administered in that court, they will be held to be the Bank itself, and chargeable with the payments of the debts of the Bank, created as this debt was. The bill charges on these parties a course of dealing with the Bank, its issues, assets and credits, utterly regardless of any thing, other than their own private emolument; wherein the interest of the public was never thought of; and their own position, influence and advantages as trustees of a public institution, were perverted to private ends; the laws of this State disregarded and contemned, and the creditors defrauded.

The proof sustains all the charges of the bill. The Bank of St. Marys, and John G. Winter and Jos. S. Winter & Co., were one and the same thing. The Bank was moved to Columbus in 1845. The firm of Jos. S. Winter & Co. were established at Montgomery in 1845. The suspension of the Bank and the suspension of the active business of the firm were simultaneous. Of the $225,000 of capital stock, upwards of $180,000 stood in the name of John G. Winter; how much of the remainder was held by him in other names does not appear. He was the president. The board of directors consisted of him, his two sons, Jos. S. and Geo. W. Winter, Moody and Wildman. His son, George W., was cashier; the directors received their stock from him. Simultaneous with the establishment of Jos. S. Winter & Co. at Montgomery, the issues of the Bank began to enter into the currency of the country, till they formed much the larger portion of the currency. The firm of Jos. S. Winter & Co. dealt entirely in this currency. Their clerks were instructed to issue it in preference to other notes. Millions of dollars in its bills were issued by the Winters; they were the chief agents in its circulation; large amounts were on deposit with them; notes apparently new were constantly issued by them; notes are proved to have been signed by the president at their office in Montgomery; the cashier, Geo. W. Winter, admits it may have been done once or twice, or *perhaps oftener*, and that

notes so signed had been handed over to the firm and issued by them. Jos. S. Winter & Co. sent for and received the notes of the Bank, whenever they wanted them; sometimes they came by mail, sometimes by a messenger, but generally by the railroad conductor; and for all these notes trusted with them, and issued by them, Jos. S. Winter & Co. are never known to have given any securities. The cashier of the Bank refuses to exhibit the accounts of the Winters with the Bank; but admits they had large discounts and were profitable customers. He cannot or will not show when the directors met, or that they ever had any meeting: no proof that the board knew of the resolution to suspend specie payment by the Bank—that any minutes were kept, or that they were ever consulted in any of the operations of John G. Winter, the president, though those things were required by the charter.—Prince's Digest, 153. The board of directors were chosen by John G. Winter, and looked upon as an incumbrance—barely tolerated to keep the Bank under organization. All the proof shows that John G. Winter was the manager and controller of the Bank, and he so held himself out. The entries on the books of Winter & Co. were reversed as soon as made; but when correctly stated always showing large debts due to the Bank, which were balanced by fictitious entries. The identity of the parties is shown in the evidence of Holcombe. The Winters instructed the Bank to whom to send its business in Mobile. The Bank draws its bill of exchange, and the cashier writes he has directed Winter & Co. to provide for it. The Winters continued their active agency in issuing the notes of the Bank to the last moment, and after its bill on Holcombe had been protested. In short, the allegations of the bill are fully proven; sometimes as strongly by the significant silence of the witness, as by his direct answers (*vide* the interrogatories put to Geo. W. Winter, and the answers of that witness). And this proof is obtained mainly from the friends and agents of the Winters themselves.

There is nothing to justify or excuse the failure of the Bank to meet its obligations, under the management of John G. Winter and his board of directors. No loss by the Bank is shown—all loss is denied. No account is given of the assets

of the Bank, yet the Bank refuses to pay its debts, and has become insolvent. In June, 1851, the president and cashier reported to the governor of Georgia, that the Bank had in cash, assets, say $271,000; exchange maturing, $352,000; notes discounted, $120,000—743,000. When it failed, its debts were, bills, $355,000; deposits, $90,000; protested drafts, $140,000—$585,000; surplus, $158,000. And for some of the debts due at the time of its failure, the testimony shows that John G. Winter has arranged, and has recognized his individual liability.

The ignorance of John G. Winter of the amount of the debt of his son Joseph S. Winter to the Bank, in liquidation of which he joined that son in executing notes to the Bank, is edifying. He neither knows the amount, nor any circumstance connected with the transaction, but the date of the notes. The fact he does know is striking. How came that settlement of Jos. S. Winter with the Bank to be so nearly simultaneous with this transaction with the plaintiffs? How came there an individual debt of Jos. S. Winter, in place of a debt due by Winter & Co.? or that any settlement at all was had? Winter & Co. are the parties that are shown to have dealt with the Bank and obtained discounts in fit; and this settlement so opportunely made is the first of any kind that has been hinted at as being made with either of that firm.—Such items as have leaked out of the carefully guarded dealings of these parties, are suggestive of explanation, which the defendants have declined to give.

From the proof, the complainants insist the charges of the bill are fully established, and a case is made out, of the use without stint, and without accountability or control, by John G. Winter and Jos. S. Winter & Co., its president and one of its directors, of the assets, issues, credit and property of the Bank of St. Marys, for their private and individual gain, while other stockholders, if any, and the creditors have been defrauded of their property. This is a breach of their duty for which they are liable in their individual estates. The president and directors of a bank hold the position of trustees; the assets and property of a bank or any moneyed corporation of that kind, form a trust fund: and this fund, the directors or trustees are bound to administer for the use and

benefit of the creditors and stockholders. This principle is fully sustained by the cases.—Wood *et al.* v. Dummer *et al.*, 3 Mason's Rep. 308, 311–313; Taylor v. The Miami Exporting Co., 5 Hammond 162; S. C. 5 Cond. Ohio Rep. 99, 101, 103; Robinson v. Smith, 3 Paige 222, 231,–2; Cunningham v. Pell, 5 Paige, 607, 612; Perry *et al.* v. Millaudon, 3 Louisiana, 568, 571, 585, 594. These are all cases of proceedings against the directors of corporations, to recover compensation for losses, caused by fraudulent or negligent management of the corporation funds—some are suits by creditors, others suits by shareholders. Dudley v. Price, adm'r, 10 B. Monroe 84, 86, is a case by creditor against shareholder, for receiving dividends that should have gone to pay the plaintiff's debt; the claim was sustained. The rule is, that the trust funds can be followed wherever they can be found—to whosesoever hands they may come, who had notice of the trust; directors and stockholders are chargeable with notice by virtue of their position.—3 Mason 312; 10 B. Monroe 86; 7 Eng. Law & Eq. R. 234. The directors (says one of the cases) who willfully abuse their trust, or misapply the funds of the company, are personally liable as trustees to make good that loss, equally so, if they suffer the corporate funds to be lost or wasted by gross negligence.—3 Paige 231; 5 *ib.* 612; 3 Louisiana 568; 2 Story's Eq. § 1252; 2 Johns. Ch. 389; 1 Edward's Ch. 513; *ib.* 84, 88.

The bill is well brought in form. The Bank is made a party defendant, and the directors are alleged and proven to be still directors, holding office in the Bank—and are charged and proven to be the mere tools of John G. Winter, and "men of straw" of his creation. The proper forum to administer relief in this case is a court of equity.—15 Mass. 505, 522; 16 *ib.* 15; 12 Metcalf 371. If the case were, the Bank by new officers, in place of those charged with these breaches of trust, seeking to recover for the use of the Bank losses thus created, a court of common law might furnish relief.—3 Wend. 130. But the same parties still remain in office and still control its assets. The stock of the Bank is shown to be almost exclusively the property of one man—and that man the party who has actually managed the corporation for the benefit of himself and his firm. Equity is the only tribunal that can

administer adequate relief.—3 Mason 310; 15 Mass. (522) 491. But in this case, the court, by the law under which it proceeds (attachment law of 1846) administers justice, according to the principles both of law and equity. Certain facts give jurisdiction of the cause: these conditions do not refer to the nature of the claim sought to be enforced, as legal or equitable, but authorize the court to administer a remedy, whether the claim on general principles be of legal or equitable cognizance.—Act 1846, Pamp. Acts 17, 19. We have no special legislation on the subject of closing banks for breaches of duty; if such existed, there is an abundance of facts to wind up the affairs of this Bank of St. Marys over and over again.—6 Paige's R. 497, 509.

Again; the bill charges, and the testimony sustains the charge, that John G. Winter and his firm have engaged in the prosecution of a banking business, and in the issue and circulation of the notes of a foreign bank, in violation of the laws and policy of this State. Alabama has seen fit to declare that it shall not be lawful for any foreign bank or corporation, by agent or otherwise, to discount bills or promissory notes in this State (Clay's Dig., 133, § 1) except by the exclusive use of gold and silver coin, or bills issued by domestic banks.—Act 1848, Pamp. Acts 81. She has also seen fit to forbid the issue of any notes for circulation as money by any company, or corporation, other than the chartered banks of the State.—Acts 1839, p. 93. She has declared that "every person who may be a partner or stockholder" in such company or corporation, "shall be liable to the holder of any note, bill, bond or post note, issued, written or put in circulation," by such company or corporation, for the amount of such note, bill, &c., which may be recovered by the holder before any court having competent jurisdiction.—Clay's Dig., 133, § 3. The answers of these defendants admit that they are the agents in this State of the Bank of St. Marys: the evidence is conclusive of their constantly and to large amounts issuing and putting in circulation the bills of that Bank. They are confessedly stockholders and active managers of its affairs, and the whole case shows such a connection of the Winters with the Bank, and such an agency about its business, that to hold them guiltless under the law,

would be to sanction a fraud upon the statute. It is contended, therefore, that these defendants, John G. and Jos. S. Winter, under the legislation of the State, and by their dealing with the issues of the Bank within this State, have made themselves personally liable to pay the debt, and that the decree was properly rendered by the chancellor declaring them liable. Atterberry v. Knox & McKee, 4 B. Monroe 90, 92, is an authority upon a statute of Virginia and Kentucky, similar to the Alabama statute, to show that the Bank of St. Marys falls within the prohibition of the law, and fixes the personal liability upon these defendants.

LIGON, J.—We deem it unnecessary to consider separately each objection which has been made to the recovery, and proceedings in this case in the court below, as they are presented in the assignments of error in the record; since, to do so would only tend to lengthen this opinion unnecessarily. It will be sufficient to classify the assignments of error and thus pass upon them.

1. It is insisted that there is no equity in the bill, as amended, which would give the Chancery Court jurisdiction under the ordinary powers of that court; and that the bill is not so framed as to bring it within the provisions of the act of 1846.

On the first branch of this objection it may be remarked, that strict trusts are admitted to be open at all times to the examination of a court of equity, and an unfaithful trustee has been constantly brought before it, and made both to discover the fund belonging to the trust, and to account for its management and misapplication. If fraud in the management of the fund is charged in the bill, by one interested in the trust estate, and who has been injured in consequence of such fraud, there is no doubt of the jurisdiction of the court. If, superadded to the matters of trust and fraud, the bill, as in this case, seeks a discovery and account, it will embrace nearly every ground on which the original jurisdiction of the Chancery Court is said to rest. In such case, it is immaterial whether a court of law can afford to the complainant partial or full relief, in the matter complained of, it cannot hinder the aggrieved party from resorting to a court of equity for redress.

It is charged in the bill under consideration, that the complainants are creditors of the Bank of St. Marys, to the amount of twenty thousand dollars: that said Bank has failed to meet its liabilities, and as a corporation has become insolvent; that the defendant John G. Winter is its reputed and acting president, and owner of nearly all its stock; and that Joseph S. Winter is also a stockholder and director in the institution; that for sometime before the failure of the Bank, its affairs had been managed exclusively by John G. Winter, or those who were subject to his will and dictation; that under such management it had been used for his own purposes, and that of the firm of Joseph S. Winter & Co., which was engaged in business, as bankers and brokers, in Montgomery, Alabama; that the Bank was chartered by the State of Georgia, and located at Columbus in that State, but that for several years past all its operations have been carried on in Montgomery, Ala., by the house of Joseph S. Winter & Co., who issued and put in circulation its bills, in Alabama, to an amount exceeding five hundred thousand dollars, and dealt in them for their own private emolument, without any security to the Bank, and without the knowledge, consent, or action of the board of directors, if, indeed, there existed such a board; that the complainants were holders of twenty thousand dollars of the bills of said Bank, which were issued and put in circulation in this State, by John G. and Jos. S. Winter, and which were held by them at the time the Bank first refused to pay specie, and in exhange for which the draft of the cashier for a like sum, now exhibited with the bill, had been given to them; that by means of these illegal and fraudulent practices, Jos. S. Winter & Co. had realized a large fortune, while the Bank has become insolvent. The bill further alleges that the estate thus accumulated by John G. and Jos. S. Winter, and Jos. S. Winter & Co., is of right the property of the Bank, and should be charged in their hands with the payment of the demand of complainants. It is also alleged, that the Bank has been rendered insolvent by the conduct of the stockholders, in withdrawing from its vaults the capital stock paid in by them on their subscriptions, by way of loans or otherwise, leaving the institution destitute of the means of paying its liabilities, or redeeming its bills. A discovery as

to these matters is prayed, and there is a prayer for general relief.

It is beyond doubt that the directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter, and in good faith. If they fail in either respect, they are liable to the party in interest who is injured by it, for a breach of trust, and may be made to account with him in a court of chancery.—Attorney General v. Aspinall, 2 Myl. & Cr. 625; Same v. Kett, 2 Beavan; Same v. Cor. of Leicester, 7 Beav. 176.

By the original charter of the Bank of St. Marys, a board of directors, seven in number, is required in the management of its affairs.—Prince's Digest 133, § 5. By the amended charter, the number is reduced to five, three of whom constitute a quorum to do business. These are required to be elected by the stockholders annually, and are to serve until the end of the first Monday in January next after their election, and no longer. At their first meeting after the election, they are required to choose one of their number to act as president. In the act of incorporation, certain fundamental articles of the constitution of said corporation are inserted, as a part of the charter. By the second of these articles, the qualifications of a director are prescribed, and are as follows: "None but a stockholder, entitled in his own right to *ten shares, being a citizen of this State*, and not being a director of any other bank, shall be eligible as director."—Prince's Dig. 134, rule 2. By the tenth of these rules it is provided, that "The bills obligatory, and of credit, notes, and other contracts whatever, shall be binding and obligatory on said corporation; *provided*, the same be signed by the president, and countersigned or attested by the cashier of said corporation."—Prince's Dig. 135, rule 10. This charter was granted in December, 1836, and was to continue until the first January, 1856. The location of the Bank was subsequently changed from St. Marys to Columbus, by act of the Legislature of Georgia. The fifth section of the act of incorporation authorizes the election of directors, and the full organization of the Bank, so soon as fifty thousand dollars of the

capital stock should be actually paid in in gold or silver.—Under the original and amended charter the Bank went into operation, and in the month of April, 1852, it suspended payment, and has since been insolvent.

It appears by the bill and proof, that, at the time of the suspension, the board of directors was composed of John G. Winter, president, and L. B. Moody, P. H. Wildman, Geo. W. Winter, (who was also cashier,) and Joseph S. Winter; that the four last named persons were the owners of only five shares of stock each, and Jos. S. Winter and L. B. Moody were resident citizens of the State of Alabama. John G. Winter owned eighteen hundred and twenty-seven shares, the whole capital being only $225 717.

The board was not qualified to act as directors of the Bank of St. Marys, for the reason, that but one of its members possessed the necessary qualification as a stockholder. None but John G. Winter owned, according to their own showing, as many as ten shares of stock in his own right. Jos. S. Winter and Moody were further disqualified because of their non-residence. The operations of the Bank, under their direction and control, were therefore illegal and fraudulent.—When to this is added the fact, which is directly charged in the bill, and is not denied in the answer, although, from its very nature, it must have been within the knowledge of John G. and Jos. S. Winter, that the stockholders had withdrawn the amount of their subscriptions from the vaults of the Bank, in the shape of loans or otherwise,—it establishes, beyond controversy, that the stockholders themselves participated actively in the fraud which was practiced upon the note holders and others creditors of the institution.

The capital stock of the Bank, with all its property and assets, is to be regarded as a trust fund for the payment of creditors; and the stockholders, directors, and agents of the Bank, are trustees for their benefit, and as such may be made to discover and account in chancery. So, also, if any one interfere with the trust fund without authority, and squander or misappropriate it, he will be held to be a trustee, and made to account as such.—7 Beav. 175.

In the present case, we have no hesitation in saying, that the bill may be retained under the ordinary jurisdiction of

the Chancery Court, without resorting to the act of 1846 in order to give the court jurisdiction.

2. But the bill is also good, under that act, as to John G. Winter, and the Bank of St. Marys.

The act provides a remedy by attachment against non-resident debtors, who have property in this State, whether their claim to such property be legal or equitable. All that is required of the creditor, in order to entitle him to the remedy provided by the act, is, that he shall swear to his demand, to the non-residence of his debtor, and to the existence of legal or equitable estate belonging to him within the limits of this State; and that he (the creditor) should execute an attachment bond.—Sess. Acts 1845–6, p. 17.

We do not understand the act to require that these facts must be made to appear by an affidavit separate and apart from the bill. It will suffice, if the bill sets them forth with clearness, and is verified by the oath of the creditor, or some person for him.—Flake & Freeman v. Day & Co., 22 Ala. R. 132. The act is remedial in its character, and as such should receive a liberal construction. In this bill, the indebtedness of the Bank is by contract, for the payment of twenty thousand dollars, and this distinctly appears by its allegations; so, also, is the fact of its location in the State of Georgia, and its title to property and choses in action in this State. The bill is verified by the oath of Newton St. John, one of the complainants; and this is a sufficient compliance with the requirements of the act of 1846, to authorize the court to take jurisdiction of the case, as to the Bank, under that statute, and to issue the attachment therein provided. The allegations of indebtedness by John G. Winter, and his non-residence, are set out with equal clearness, and the bill is good as to him in this aspect, as well as in the first.

But it is said that his indebtedness does not appear by the bill, and, even if it did, his non-residence is denied in his answer, and that the answer is sustained by the proof.

On the former of these points, we think his individual indebtedness in the sum sued for is sufficiently averred. It is true, it does not exist by contract, nor is it evidenced by any writing; but it is not the less a legal demand against John G. Winter, in his individual character, for the whole amount

of the sum claimed by the appellees. It is alleged in the bill, that John G. Winter and Joseph S. Winter *issued and put in circulation in this State* more than five hundred thousand dollars of the bills of the Bank of St. Marys; and that the bills of that Bank which the appellees held, and on account of which the draft exhibited with the bill was drawn, were of this class. Neither of these allegations is denied by John G. Winter, although he should have known whether they were true or false; and under these circumstances, they must, as against him, be taken as true. It is charged, also, that John G. Winter is the principal stockholder, and, under our statute, he is individually liable to the holder, for every dollar of the notes of the Bank of St. Marys which he issued, or put in circulation, in this State.—Clay's Dig. 133, § 3. The appellees, therefore, might well proceed against him as a non-resident debtor under the act of 1846.

But, it is said, he has, by his answer, put the fact of his non-residence in issue, and by his proof shown that this allegation in the bill is untrue.

This part of the answer must be taken as a plea in abatement to the jurisdiction; and as the attachment under the act of 1846 is made, by the act itself, to conform to the suing out of that process at law, we are inclined to the opinion that the proceedings under it, as it respects the pleadings, must be governed, as nearly as practicable, by the same rules; and, as in a suit at law under our ordinary attachment statutes, the particular grounds on which that process is sued out are not allowed to be traversed by such a plea, neither can it be done under the act of 1846.

But, we apprehend, the defendant John G. Winter will not be allowed to set up this matter as a defence to this bill, for another reason: It is shown that, up to the time of the suspension of the Bank, John G. Winter held himself out to the world as its president, and acted as such; he cannot now deny that character, nor aver in a controversy with one who has dealt with that institution while he acted as such, that he was not qualified to hold that office. By the charter, the president is required to be chosen from the directors, and these are required to be citizens of the State of Georgia; and John G. Winter must be held to reside there.

The bill, as to him, is good, both under the statute of 1846, and as one appealing to the ordinary jurisdiction of the court of equity; and, as it contains a prayer for general relief, will warrant any relief which that court could grant under its allegations.

3. We have said, that the bill is well filed under the act of 1846 against the Bank of St. Marys. This institution is a foreign corporation, and is shown to be the debtor of the appellees to the amount claimed by them. This indebtedness, however, is questioned by the counsel for the appellants, who insist, that the draft of Geo. W. Winter on Holcombe was accepted by Henley's agent as a payment of the notes of the Bank which he held, and which were surrendered by him at the time the draft was delivered.

The rule is, that when one security is substituted for another, without any new consideration passing between the parties, the substituted security does not extinguish the existing indebtedness, unless it is so agreed between the parties, and there is no fraud on the part of the debtor.—Toby v. Barber, 5 Johns. 68; McGinn v. Holmes, 2 Watts 121; Higgins v. Packard, 2 Hall 547; Chastain v. Johnson, 2 Bail. 574; Coxe's R. 85; 9 Conn. 23.

In the present case, it appears that the notes of the Bank were surrendered, and the draft accepted by the creditor, solely for the accommodation of the Bank, and not in payment. For this reason, the Bank cannot set up the draft as a payment of the notes held by Henley. Again; the draft on Holcombe was received upon the assurance of the agents of the Bank that it would be promptly paid; when it is clear that, at the time it was drawn, as well as at its maturity, the Bank did not have the necessary funds in the hands of the drawee, and consequently had no reason to believe that it would be honored or paid. These facts were known to the Bank, but unknown to the agent of Henley, so that the Bank is justly chargeable with fraud in inducing its creditor to receive the draft on Holcombe. In this view of the case, its indebtedness would not have been extinguished, even if the draft had been accepted as a payment: the fraud would prevent it from operating as such.—Lake v. Gilchrist, 7 Ala. 955; 15 Johns. 475; 2 N. & M. 102; 12 Pick. 126; 1 *ib.* 415; 11 Mass. 359.

Had this draft been drawn in good faith, and had the Bank been the drawer, still, as it is not shown to have been taken in actual discharge of the notes surrendered, it would not amount to a payment. As it is, however, the most favorable light in which the transaction can be viewed for the Bank, is, to regard the draft of Geo. W. Winter as a substituted security in the hands of the appellees, and to treat it as the note or draft of a third person, substituted for the bank bills which have been surrendered. Thus considered, the receipt of the bill of exchange, or draft, imposed no other obligation on the appellees, than its presentment to the drawee for payment; if this was refused for want of funds of the drawer, the holder might at once proceed against the Bank, on its original indebtedness.—Printems v. Helfried, 1 Nott & McC. 187; 1 Esp. 245; 7 Term R. 243–58; Markle v. Hatfield, 2 Johns. 455.

The holders of this draft did more: they caused it to be regularly protested for non-payment, and notice of such protest to be given to the drawer. Our conclusion is, therefore, that the Bank is debtor of the appellees to the amount of the notes, and no judgment at law is necessary to enable them to proceed against it in equity for the collection of their demand, under the act of 1846.

4. But it is said that the Bank is not in court for any purpose, as the order of publication against it is fatally defective; and that the decree *pro confesso* being also irregular, it was error in the court below to proceed to a final decree against it. It may, we think, be safely conceded, that both the orders of publication and the decree *pro confesso* before the register against the Bank are defective, and still the final decree is correct. We have already held, that where a defendant in chancery appears by his solicitor, and makes no objection to the irregular manner in which he was made a party to the case, such appearance amounts to a waiver of all irregularities in the service of process and the decree *pro confesso* taken against him.—Mobile & Cedar Point R. R. Co. v. Talman *et al.*, 15 Ala. 472; Davenport v. Bartlett & Waring, 9 *ib.* 179; 5 *ib.* 158. In this case, the Bank appeared by a solicitor of the court, for several purposes, after this decree *pro confesso* was entered, and on his application orders were made in its

favor. The first of these was an order, made on the application of the Bank, for a commission to take its answer, which was granted; next a motion was made by it to set aside the decree *pro confesso*, (not for irregularities, but in order to allow it to file a plea *puis darein continuance*,) which was refused; and lastly, the same solicitor filed cross interrogatories on behalf of all the defendants, and, of course, including the Bank. Superadded to all this, the Bank appears here, and assigns for error the action of the court below in refusing to set aside the decree *pro confesso* in order to let in its plea; thus indirectly admitting its appearance in that court, and directly complaining of what was there done on its appearance. It cannot be heard in this court to complain of such irregularities as are cured by an appearance without objecting to them in the court below; nor can it, after such appearance, claim, in this court, rights which only belong to a defendant who has not submitted to the jurisdiction of the court below. Cullum v. Batre, 2 Ala. 415; Davenport v. Bartlett & Waring, *supra*.

While the Bank, by its appearance and submission to the jurisdiction of the court below, has deprived itself of the right of objecting to the regularity of the service of process and the decree *pro confesso*, it does not forfeit the right to review in this court the action of the chancellor in refusing to set aside the decree *pro confesso* on its motion. But did the court err in overruling the motion to set aside the decree *pro confesso*, in order to allow the Bank to file its plea? Our statute (Clay's Dig. 251, § 39) provides, that no decree *pro confesso* shall be set aside, but upon filing a full and complete answer to the bill. This is the general rule, and we know no instance in which it has been departed from in favor of filing *a plea*. That its letter has been departed from in favor of a partial answer, containing matter which, if true, put an end to the case once and forever, is true; and we still adhere to the correctness of that practice.—Bentley *et al.* v. Cleaveland, 22 Ala. 814. That case, however, not only does not countenance the doctrine that such decrees should be set aside for the purpose of allowing a mere plea,—so far from doing so, it expressly holds that such a practice would be wholly without authority. It is there said, "We cannot well see whence the

court derived its authority to direct this answer to stand for a plea, and to be tried as such. Nor do we think, under our practice, a defendant, after a decree *pro confesso*, has a right to put in any defence by way of plea, any more than under the English practice he could do so after answer filed. Under both systems, it would be an anomaly to find a plea allowed at this stage of the proceedings." Indeed, under our practice, it may well be doubted, whether a plea, or special demurrer, would be received at any stage of the case, if it was unaccompanied by an answer.—Childress v. Crawford, 1 Ala. 482. Our statute, which allows the matter of both pleas and demurrers to be embraced in the answer, was evidently intended to avoid the delays incident to the English practice, and to hasten the trial of the case on all the issues of both law and fact at one and the same time. Be this, however, as it may, there is no rule, either of our own or the English Chancery Court, which allows a plea, technically so called, to be interposed after a decree *pro confesso* against the party who offers it. The ruling of the court below, in this respect, is free from error.

The view which we have taken on this part of the case renders a special examination of the errors assigned in relation to the decree *pro confesso* unnecessary. The decree *pro confesso*, rendered by the chancellor on the hearing, was not needed in order to enable him to proceed to a final decree, and no injury or benefit can result to either party from its rendition.

5. The next assignments of error relate to the final decrees against Joseph S. and John G. Winter as individuals, and as the firm of Joseph S. Winter & Co.

We have already seen that the conduct of the directors of the Bank of St. Marys, in allowing the stockholders to withdraw the amount of their subscriptions from its vaults, and in permitting Joseph S. Winter & Co. and John G. Winter to use, without security, more than a million and a half of its funds in their own private business, is a fraud upon the creditors, and would not only render the directors liable for the sums thus fraudulently withdrawn, but would render each agent of the Bank who participated in it liable in his individual capacity to the creditors, for so much of said sums as

could be traced to his hands.—Att'y General v. Corporation of Leicester, 7 Beav. 176. It is also clear, that, as to the creditors, these directors and agents are trustees, and as such liable to account with them for such sums as may have been lost by their mismanagement, or misapplied by themselves; and in this respect, the Chancery Court may afford relief independent of the act of 1846.

It is shown by the proof in this case, that Joseph S. Winter was a director of the Bank of St. Marys, as well as a partner in the house of Joseph S. Winter & Co. It is further shown, that this firm was the agent of the Bank, in which capacity it received largely more that a million of dollars of its notes, without any security whatever, and used them in its own business as exchange brokers, the partners charging themselves on their books with the funds so sent to and used by them, and at fixed periods causing these entries to be reversed. It is also proved, that the house of Joseph S. Winter & Co. commenced its business as brokers almost contemporaneously with the removal of the Bank to Columbus, and ceased to do business concurrently with the suspension of the Bank, at that time being indebted to the Bank upwards of one hundred thousand dollars, for which sum this insolvent institution, under the immediate direction and almost absolute control of these partners, received in payment the notes of Jos. S., with John G. Winter as surety, at *two* and *three* years.

By some singular and unexplained, and to us inexplicable, lapse of memory, the parties to these notes, in their answers under oath, say they are unable to state the precise amount of this indebtedness. The proof shows, however, that, without the intervention of the board of directors, they received from the cashier, who was the brother of one of them and the son of the other, the large sums above named, without security, and used them for their own advantage and profit. It also shows, that Jos. S. Winter & Co. received unsigned notes of the Bank of St. Marys, which were signed by the president, John G. Winter, in the city of Montgomery in this State, where the firm did business, and were put in circulation by them in this State. It also shows that a large amount of the bills of said Bank, apparently new and before unused, were received by them and put in circulation in Alabama. These

things could have been explained (if indeed they admit of any explanation) by these partners in their answers, but they are silent in respect to them. That silence, when they are so directly charged in the bill, and must be within their knowledge, must, with the other proof in the record, be taken as conclusive of their truth. The rule is, that when one, having a knowledge of the trust, intermeddles with the trust estate, and converts it to his own use, he becomes a trustee; and a court of equity will follow the fund into his hands, to make him account, not only for the fund itself, but for all profits he may have made by its use; for a trustee will not be allowed to make a profit out of the trust estate, and take it to himself. Calhoun v. King, 5 Ala. 523; Hill on Trustees, 114, 534.

How then stands the case as to Jos. S. Winter? He is a stockholder in the Bank of St. Marys, and in Alabama issues and puts in circulation the bills of that institution, to an amount greatly exceeding the demand of the appellees. Twenty thousand dollars of the notes so issued and put in circulation come into Henley's possession, in the regular course of his business. The Bank, on presentation, refuses to pay them, and becomes insolvent; and Henley and his transferrees now call on Joseph S. Winter to pay them. He is, under our statute, clearly liable for their payment.—Clay's Dig. 133, § 3.

It is no answer to this, to say that he is a stockholder only to the amount of five shares, at one hundred dollars each, and consequently should not be made liable for a larger sum. His liability does not arise under or by virtue of the charter of the Bank of St. Marys, nor in this respect can that instrument exercise any influence in fixing its amount. It springs out of our statute, and to that alone we must look to ascertain its extent. That declares, it shall be to the amount of the bills so issued and put in circulation. The Bank of St. Marys, in the issues thus circulated in this State, must be regarded as an unchartered banking association; and if its stockholders put its notes in circulation within the limits of Alabama, the law gives to the holders of such notes a right to recover their nominal amount of such stockholder.

Again; Jos. S. Winter is shown to have misused and applied to his own use very large sums of the funds of this Bank, by means of which, with other causes, it has become insolvent;

he must, therefore, account to the creditors as trustee for the sums so received and used by him, and for the profits arising from such use. He was a director of the Bank, as well as its agent, in these transactions; and good faith and common honesty both require that he should be made to account for the sums thus received by him and fraudulently used for his own emolument. There is something in the final adjustment of his accounts with the Bank, as set forth in his answer, from which fraud in that transaction becomes an irresistible inference. The Bank has large issues out, and is wholly unable to redeem them; it is about to declare itself insolvent. It has a very large claim on a solvent debtor, arising out of money furnished or lent to him, and among the very last acts of its corporate existence, it extends the time of payment to *two and three years.* This debtor is a director, and his surety is both president and director. It is impossible that such a transaction can be otherwise than a fraud on the creditors of the Bank. In this aspect, also, he is primarily liable to the appellees, and it needs not the process of garnishment under the act of 1846 to reach and charge his indebtedness to the Bank with the payment of this debt.

6. For the reasons given, showing the liability of John G. and Jos. S. Winter to account as agents of the Bank, and as such trustees for the creditors, we are persuaded that the firm of Jos. S. Winter & Co. is equally liable.

7. It is objected, however, that the decree cannot be sustained, because the proper parties complainant are not before the court; and it is insisted that Moulton and Farley were partners with Henley, and as such should have been joined. From all that appears in the record, they were only dormant partners, and their names do not appear in the transaction with the Bank. St. John, Powers & Co. have the entire legal interest in the draft, by endorsement from John Henley, and a perfect equity against the Bank on account of the notes surrendered to it, at the time the draft was drawn. In the whole transaction, from beginning to end, Moulton and Farley do not appear to have been known in it; and if they have any interest, it can be properly represented and protected by Henley, under whose name alone they did business, and with whom alone the Bank appears to have dealt.—Lord

v. Baldwin, 6 Pick. 348; Coll. on Part. §§ 660,–1; Shropshire v. Shepperd, 3 Ala. 733; Desha, Smith & Co. v. Holland, 12 *ib.* 513; Monroe v. Ezzell, 11 *ib.* 603.

The strongest evidence of the partnership between Moulton, Farley and Henley, to be found in the record, is the affidavit of J. S. Winter, which, it was agreed by the appellees, should be treated as testimony. This affidavit states, that these three persons were partners, and before the draft mentioned in the bill was given, had inserted a notice in a newspaper published in the city of Montgomery, announcing that fact to the world, and that their business would be conducted under the name of John Henley; and that Moulton and Farley were active, managing members of said firm. This evidence is not sufficient to show that Moulton and Farley were to be held as anything more than dormant partners of the house or firm of John Henley.

Gow, in his treatise on Partnership, (pp. 12, 13,) describes and defines the several kinds of partners. He says: "An actual, ostensible partner, is a party who not only participates in the profits, and contributes to the losses, but who appears and exhibits himself to the world as a person connected with a partnership, and as forming a component member of the firm. A *dormant partner* is likewise a participant in the profits of the trade; *but his name being suppressed and concealed from the firm*, his interest is consequently not apparent." The same distinction may be found in Watson on Partnership, pp. 34, 46. He says: "Sometimes all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss, &c. *Where they do not suffer their names to appear in the copartnership firm*, but at the same time receive their share of the profits, and bear their risk of loss, they are styled dormant partners."

In Leveck v. Shaftoe, 2 Esp. Rep. 468, Lord Kenyon said and held, " that if a person had been a partner, *and his name in the firm*, and he afterwards withdrew his name, but continued to receive part of the profits, though such person still continued liable to all the demands against the partnership, on the ground of the profits he derived, he would not allow persons who dealt with the firm, *without his name appearing in it*, to avail themselves of the objection of such partner's not

having joined in the action, for the purpose of a nonsuit."—To the same effect are the cases of Lloyd v. Archbowle, 2 Taunt. 324; Lucas *et al.* v. De LaCour, 1 Maule & Selw. 249; Bryden v. Taylor, 2 Har. & John. 396; and Mitchell v. Dall, 2 Har. & Gill 159.

In this case, it appears, the firm was carried on under the name of John Henley alone,—all its transactions were done in his name. In his name the Bank of St. Marys dealt with the firm; and the interest of the dormant partners cannot be set up now, when his name only is used in a bill in chancery, filed in behalf of the firm against those who have dealt with them under his name alone, in order to defeat a recovery.—The only interest these appellants can possibly have, in having the names of these dormant partners spread upon the record in this suit, is, that the decree rendered in it may conclude them as to the matters in controversy. It is not necessary that they should be named, in order to be concluded. John Henley, in whose name this security is taken, had the unquestionable right to negotiate it in his own name, and thus pass the entire interest in it to his endorsee or transferree, without consulting his dormant partners. To them he is accountable as trustee for all securities thus taken by him in the business of the firm, and in that character he must be considered as representing them in this suit. It is well settled, that in all controversies concerning a trust estate, where the trustee can fully represent the interest of all the beneficiaries, they are not necessary parties to the bill.—Walker v. Miller, 11 Ala. 1067, and cases their cited.

That they may, if not too numerous, be proper parties, is conceded; but this is not the question here. If the decree against or for the party who represents their interest would conclude them, it is all the appellants have a right to demand; and regarding Henley as holding the entire legal interest of the firm, in trust for his dormant partners, in proportion to their several interests in this security, he alone is a necessary party, either at law or in equity. The confidence reposed in him by his partners, in permitting the business of the firm to be carried on in his name, creates him trustee for them, as to all assets or property appertaining to the firm which he may hold in his own name. He may be sued alone for the debt of

the firm, and the judgment against him may be levied of the goods of the firm.—Lord v. Baldwin, 6 Pick. 348. He may, also, as we have seen, sue in his own name, and recover, notwithstanding it is objected that he has dormant partners.

It is difficult to conceive upon what principle the partner, in whose name the business of the firm is conducted, is allowed to exercise this unlimited legal control over the property of the firm, unless we refer it to the principles which govern trustees in whom are vested the entire legal estate, with the absolute right of control, being accountable only in equity for an abuse of their trust. If we are correct in this conclusion, and of its correctness there can be but little doubt, then the case cited from 11 Ala. 1067, is conclusive against the necessity of making Moulton and Farley parties to this bill.

8. It is further argued that the final decree is erroneous, inasmuch as it directs the sale of the stock of J. G. Winter in the Central Plank Road: this, it is said, is not leviable under attachment. Such stock is to be regarded as a chose in action, and constitutes a portion of the equitable estate of its owner, and as such may be charged in equity under the ordinary powers of that court, and is expressly chargeable by attachment under the first section of the act of 1846.—Sess. Acts 1845–6, p. 17.

9. It is further assigned for error, that the chancellor rendered his final decree in the cause in vacation. It appears from an agreement between the solicitors for the parties in the court below, that this was done with their consent, and was requested by the solicitor for the appellants, as a favor to him. It certainly would be extraordinary to allow the appellants, by their solicitor, to obtain time in the court below, as a matter of favor to them, under an agreement to waive any irregularity which might result from the rendition of the final decree in vacation, and having thus thrown the opposite party and the chancellor off their guard, to permit the appellants to assign such irregularity for error in this court. Consent cannot confer jurisdiction; but it can waive error, or cure an irregularity. In this case, the court had jurisdiction of the cause, both as to its subject-matter, and the parties; it received the submission of the case *during a regular term of the court*, and the act of pronouncing the decree in vacation is a

mere irregularity, which is cured by the consent of parties. Minor 35. The case of Cullum v. Casey & Co. (1 Ala. 351) is different from this. In that, the case was submitted out of term time, without the consent of the parties, and the decree final was in like manner pronounced out of term time and without consent. Such a decree could not be supported.

It is due to the solicitors for the appellants in this court to say, that they had no agency in making the agreement in the court below, nor does it appear in the record that they were concerned in the case in that court.

10. We have seen that the Bank of St. Marys is not, under its charter, liable on the draft drawn by Geo. W. Winter, its cashier, and, as such is the case, it cannot be held to be liable for the damages resulting from the non-payment and dishonor of this draft. The decree of the chancellor, in respect to these damages, is erroneous, and to that extent must be corrected, and a decre here rendered for the amount of the bank bills, with legal interest thereon.

The decree of the chancellor, thus amended, must be affirmed, at the costs of the appellants, both in this court and the court below.

GOLDTHWAITE, J.—I am satisfied that Moulton and Farley, upon the evidence which the record discloses, cannot be regarded as dormant partners of the firm of John Henley, and for that reason they should have been joined as plaintiffs. In other respects, I agree with the results of the opinion.

LANG'S HEIRS *vs.* WARING.

1. When a bill is dismissed without prejudice, the effect of the reservation is, to prevent the decree from constituting a bar to another bill brought upon the same title; but it by no means compromits the court as a judicial determination in favor of that title.
2. Although a court of equity considers and treats real property, purchased with the partnership funds, and held for the purposes of the firm, as constituting part of the stock of the partnership, it leaves the legal title undis-

turbed, except so far as may be necessary to protect the equitable rights of the respective partners.

3. If the heirs of the deceased partner are sued, in equity, by a derivative purchaser from the surviving partner, for a divestiture of title, they have the right to show that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity should not sanction.
4. And the fact that the firm is insolvent, and that all its assets are required to pay the debts, is no answer to their right to defend.
5. The case of Andrews' Heirs v. Brown (21 Ala. 437) was not intended to establish the doctrine, that a court of equity, in all cases where the surviving partner has disposed of the real estate of the firm, however unfair, inequitable, or unauthorized such disposition might be, would compel the heirs to convey: such a doctrine cannot obtain in equity.
6. If the surviving partner dispose of the real estate of the firm for a grossly inadequate consideration, and under such circumstances as were well calculated to cause it to be sold for an almost nominal sum, equity will not lend its aid to perfect such a sale; especially, when its action is invoked by one whose conduct contributed, in all probability, to bring about the sacrifice.
7. The surviving partner having executed a mortgage, in his own name only, on real estate belonging to the firm, to secure the payment of notes which he had executed in the name of the firm as surviving partner, but which created no obligation as against the firm, the land was subsequently sold under judgments, older than the mortgage, which had been rendered against him as surviving partner, and was purchased by one of the plaintiffs, who thereupon entered upon the land, and was in possession at the time of the sale under the mortgage; at which sale the land, though worth $8000, brought only $250; the first purchaser, having bought the interest of the second, and compromised with the administrator of the deceased partner, filed his bill in equity against the heirs to obtain a divestiture of their legal title: *Held*, that the court should not lend its aid to perfect such a sale, nor disturb the legal title of the heirs.
8. The maxim "*caveat emptor*," as applicable to sheriffs' sales, holds as well in equity as at law.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. J. W. LESESNE.

THIS bill was filed by Moses Waring, the appellee, against the heirs-at-law of Willis Lang, deceased, to obtain a divestiture of their legal title to a certain storehouse and lot in the city of Mobile, and to enjoin them from the further prosecution of an action at law to recover its possession. The complainant alleges, that this lot was purchased by the firm of McRae & Lang (which was composed of said Willis Lang and one Colin C. McRae) with partnership funds, and for partnership purposes, and was held by them as partnership property; that Lang died in 1837; that the said firm was largely

insolvent at that time, and McRae was also individually insolvent; that said McRae, as the surviving partner, proceeded to settle the affairs of the partnership, and disposed of all its assets, including said house and lot, and his own individual property, in payment of the firm debts; and that he died insolvent, in 1843, leaving a balance of the partnership debts still unsatisfied. The complainant then deduces two distinct titles in himself to the said house and lot under mesne conveyances from the said McRae, as surviving partner of the said firm; which may be thus stated:

1. He alleges that said McRae & Lang, during the existence of the partnership, had endorsed a note for about $3,600, for the accommodation of one Ryland, due and payable to one James F. Bates; and to secure them against their endorsement, Ryland had deposited in their hands for collection a note on one Graves for about the same amount; that they collected the note on Graves, but failed to apply the proceeds to the payment of Ryland's note to Bates, and were thus indebted to Ryland, as well as liable to Bates, at the time of the dissolution of the firm by Lang's death; that after Lang's death, McRae, as the surviving partner, executed a note to said Bates, in the firm name of McRae & Lang, for the said sum of $3,600, (which note was endorsed by Ryland,) and also executed a mortgage on said house and lot to secure its payment; that said note was not paid at maturity, and accordingly the house and lot were sold pursuant to the terms of the mortgage, at which sale it was purchased by Gayle & Phillips, they being the highest bidders, for the sum of $250; and that complainant, in 1845, purchased from said Gayle & Phillips, for the sum of $350, and received their quit-claim deed to the premises, thus obtaining a complete equitable title.

2. In addition to the title thus derived through Gayle & Phillips, the complainant alleges, that the firm of McRae & Lang, at the time of its dissolution by Lang's death, was largely indebted to Bartlett & Waring, of which firm complainant was the surviving partner; that complainant, as such survivor, obtained two judgments against said McRae, as surviving partner of the firm of McRae & Lang, on this indebtedness, amounting in the aggregate to about $15,000; that on

these judgments, which were rendered in 1838, previous to the execution of the mortgage to Bates, executions were duly issued, which were levied on the said house and lot; that the widow of said Lang, who was also his administratrix, filed her bill in equity to enjoin the sale of said house and lot under said executions, but her bill was finally dismissed, and the house and lot were then sold under said executions, and were purchased by complainant for the sum of $9,860; that a large balance was still due on said judgments, and complainant, after exhausting all the partnership property, commenced suits against the said administratrix of Lang to recover this balance out of his estate; that these suits were litigated for a long time, but complainant at length succeeded in obtaining a judgment in one of them, after which he compromised the other suit with the administratrix, by receiving in satisfaction of the entire balance her acceptance for about $6,000; that the entire value of the house and lot does not exceed $5,000, and yet the defendants have received more than twice that sum from complainant on account of it.

The defendants answered, insisting that the notes on which Waring recovered judgments against McRae, as surviving partner of McRae & Lang, were endorsed by McRae, in the firm name, without the knowledge or consent of Lang, for the accommodation of one Dade, and therefore created no obligation or liability against said Lang or themselves; that they are not bound by the judgments recovered by the complainant against said McRae and the administratrix of Lang, and that complainant purchased with full knowledge of their title; that complainant, previous to the filing of his bill in the present case, filed a bill in equity against them touching these same matters, which bill, after a long litigation, was finally dismissed by the Supreme Court, at its June term, 1850, (see 17 Ala. 145,) but without prejudice to the title which complainant might have under his alleged purchase from Gayle & Phillips; that complainant is precluded by this decree from again setting up any of the matters contained in his first bill, except his alleged purchase from Gayle & Phillips; that respondents do not know anything of the alleged transactions between said McRae & Lang, during the existence of the partnership, and said Ryland and Bates; but they allege that

said notes and mortgage were executed by said McRae individually after the dissolution of the firm, and therefore created no obligation against the firm, and could not affect them in any way.

Such portions of the evidence as are relied on by the parties in support of the allegations in the pleadings, are detailed with sufficient particularity in the subjoined argument of the appellee's counsel; and the material facts, which bear upon the issues made by the bill and answers, will be readily understood from the statements contained in the opinion of the court. The chancellor sustained the bill, and granted the relief prayed; and his decree is now assigned for error.

HOPKINS, JONES & LOMAX, and JNO. T. TAYLOR, for the appellants. (No brief on file.)

GEO. N. STEWART, *contra:*

The right under which we claim this property is based on these propositions: 1st, that it was partnership property, bought with partnership funds, and for the use of the trade of the partnership itself; 2d, that the firm was, at the time of the death of Lang, "insolvent," owing more just debts than it had assets to pay with; 3d, that it was disposed of by the surviving partner, and by his act applied to discharge debts of the firm; 4th, that these were, in fact, debts for which the firm was bound; 5th, that Waring has obtained this property by lawful conveyances, and that it has by passing into his hands, in truth and fact, extinguished debts of the firm to an amount greater than its utmost value.

That it was firm property is not in fact a debateable question. It is charged in the bill; not directly, but only evasively denied by the answer, and is fully proved. That the firm was insolvent, is also a fact well established, and all the facts in the cause are in harmony with that conclusion. That it was properly disposed of by the surviving partner, is controverted by the appellants; and they also assert that the debts for which the property was sold were not debts binding on the firm property. These two propositions embrace the main objections to our title, and those on which they rely, and must therefore be carefully examined.

We will have no great difficulty in settling the law of our case: we find it, in its main features, well settled by the decisions of this court. Indeed, it is declared that these propositions to which we allude, are no longer the subject of controversy, but that they are settled questions. These settled questions extend sufficiently far to cover our case. They are as follows: 1st, that "in a court of equity, real estate belonging to the firm is considered as personal property, to this extent at least, that it is liable to pay the debts of the firm, in the same manner as if it had been personal instead of real estate;" 2d, that "the charges upon the real estate, being prior to the claims of the representatives of the deceased partner, override his wife's title to dower, as well as the title of his heir at law;" 3d, that "as the real estate is considered as personal for the purpose of paying these debts, it must of necessity follow, that he has the right in equity to dispose of the real estate for this purpose;" 4th, that "the heir at law holds the legal title, subvervient to, or in trust for, the surviving partner, who is charged with the payment of the debts." This is the language of the court in the case of Andrews' Heirs and Adm'r v. Brown's Adm'r *et al.*, 21 Ala.

The law then on these points being found, we have but to make the application of it, and meet the objections raised by the appellants. Did the surviving partner convey the property? Did his deed to Bates pass the right? It is argued that it did not, but passed only the individual half which belonged to the surviving partner. We deny that there is such a thing, in equity, as an individual half interest in partnership property; although it is true, there is such a thing in relation to title at law, as to real estate. It is only in a court of law that the heir is considered as having the legal title cast on him by descent, but this is in reality a mere fiction, an dnothing else. It is necessarily, in all cases, a title in trust for some one, and can in reality in no case be held by the heir in his own right. The moment it is ascertained that the property is firm property, it is at once established that the heir is a trustee. If the copartnership is solvent, and its value is not needed to satisfy the claims of creditors, then its value must be realized by the surviving partner, so that he may settle the firm affairs and strike a balance between him-

self and the representatives of the deceased partner, and he must pay that balance to such representative. And here we will advance the proposition, that no partner, or his representative, has the right to demand a division of property specifically: each party has by our law a right to demand a sale, and the right of each is to the division of the net balance when realized, and to nothing else.—Story on Part. §§ 356, 354, 355, 347, 350, note 1, and authorities cited; Gow on Part. 257.

We will next inquire who is entitled to this money balance on final settlement of the partnership affairs? We say the "executor or administrator" of the deceased partner, not his heir. Gow says: "In the absence of express negative stipulation, the executor has a right to insist upon the application of the joint property to the payment of the joint debts, and a division of the surplus; and if, within a reasonable time, the survivor do not account with him and come to a settlement, a court of equity will grant an injunction restraining him from disposing of the joint stock, and from receiving outstanding debts."—Gow on Part. 378; Collyer on Part. 141 to 144; 10 Leigh. Thus we see that the surplus or balance struck goes to the administrator, as personal estate, for payment, first, of the debts of the deceased partner, and then for distribution among his widow and heirs according to law; and it is only thus, and as distributee, that the heir can take, if any thing be left, and not as heir by direct descent. If then the firm be solvent, the heir is trustee of an individual half of the legal title to the lands of the partnership, and the trust is to convey it to whomever the surviving partner shall sell it to, for the purpose of settlement, so that the balance may be paid to the personal representative, which properly comes to him. But if the firm be insolvent, then the heir can have no interest whatever in it: it is a fund for the payment of the creditors of the firm, so far as it will extend, and it is the right and the duty of the surviving partner to apply it in payment, and it is the duty of the heir to convey it accordingly. In this case he is a bare, naked, legal trustee,—has no interest in the property, and has no claim, right, or title of his own, and cannot be allowed to attempt to assert his title at law. The profits made from the property, as well as the

property itself, after the decease of one partner, still belong to the joint stock till settled, as accession of capital.—Gow on Part. 380. The rents, therefore, cannot go into the hands of the heir, but belong to, and are subject to, the control of the surviving partner.

Thus we see this right at law is a mere fiction, as we have before stated. True, he has a title at law; but courts of law do not settle copartnership concerns: it is only in equity that they are to be settled, and equity treats real estate, "in all respects," as personal property. We say "in all respects,"—so is the text, and it must be carried out accordingly.—See Story on Part., p. 126, 128; Collyer 117; 1 Sumn. R. 182, 186. The principle regulating the trust is stated in the above cited case of Andrews v. Brown, 21 Ala. 443; and in addition to what has been cited from that case, we find the following language used: "Inasmuch as the real estate is considered as personal, for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow, that he has the right in equity to dispose of the real estate for this purpose; for it would never do to charge him with the duty of paying the debts, and at the same time to take from him the means of doing it. Therefore, although he cannot, by his deed, pass the legal title to the purchaser, which descended to the heir of the deceased partner; yet as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey this equity to his purchaser, and through it, he may call on the heir for the legal title, and compel him to convey."—p. 443.

We conclude, then, that McRae had the power to convey *the whole title.*

The remaining question then is, did he do so? That he did, we think, is very clearly shown; and the authorities in relation to the effect of that deed, we believe, are conclusive in our favor. The deed of mortgage by McRae purports to convey all the title or interest he could convey, and we have seen he could convey the whole, and he did so, and he intended to convey all he could convey. There is no limitation whatever in his deed. It is expressly as surviving partner that he conveys, and not in his individual right alone. We have seen,

it is true, that he could not convey the legal title, but he could convey all the interest of the firm in the property; his deed in equity is binding on the heir, and the heir is bound to conform to it. The construction to be put on the deed is conclusively shown by the decision in the case of Dundas v. Hitchcock, 12 How. Sup. Ct. U. S. 271. The rule is there laid down, as a settled rule of construction, in these words: "Whoever conveys to a purchaser, without restraining the operation of his conveyance, shall be deemed to convey in every character which enabled him to give effect to his deed." Sugden on Powers 82, and Cox v. Chamberlain, 4 Vesey, Jr., 637, are cited in support of this rule. In the case before the court, McRae recites, that he conveys expressly as surviving partner, and of course all the title of the firm passes.

We do not suppose it can be successfully maintained that he could sell, but could not mortgage. Such a position would be untenable. The surviving partner has clearly the right to prefer one creditor to another.—3 Paige 518, 525; 2 Sanf. Ch. R. 366; 1 Brock. 456; Collyer on Part. 362; 1 Metcalf 515. In the case of Andrews v. Brown, 21 Ala. R. 437, this point was made in argument denying the right of the surviving partner to secure one particular creditor, which was the case there, but the objection was not sustained. Again; this is a question in which the heir has no possible interest, as before shown, the firm being insolvent. Such a question could only arise between conflicting creditors: it is their interest only which would be affected. The right of the surviving partner to dispose of the partnership property is absolute.—He, and he alone, has the right to decide who shall be first paid, and may even secure the creditor he prefers by an assignment, "without the assent or concurrence of the representative of the deceased party, in such manner, and by giving such preference as he may think proper."—Egberts v. Wood, 3 Paige 525-6.

The argument used that the surviving partner has but a lien on the land, that he has no title, except as to half, and that consequently he cannot himself convey, but that it is only a decree of a court of chancery that can dispose of the land, and that the deed of the surviving partner operates nothing beyond the disposal of his own proper half, will do very well to use in a court of law; but is at war with the

whole system when we are in a court of chancery. This argument we have already sufficiently answered.

The defence set up that the conveyance was not made to secure firm debts, is predicated upon the argument that the giving of the notes by McRae to Bates was a discharge of the obligation of the firm, and a substitution of the individual responsibility of McRae in its place. On this point we will refer to the authorities cited.—8 Cowen 77, 147; 4 M. & K. 108; 6 Ala. 673; 10 Barb. Sup. Ct. R. 372, &c. It is a question of intention; a party is considered as releasing, where from his act it is supposed he intended so to do. It is the intent which must be inquired into.—4 Watts & Sergt. 100; 12 Johns. 409; 15 Sergt. & Rawle, 162. In this case, the manner of signing both the notes and the mortgage, conclusively shows what the intent was. They are signed as surviving partner, and not in the maker's individual character. The manner of signing is always looked to for the intent.—Whether a partner giving a bond for an antecedent debt discharges the debt or not, depends on the circumstances.—6 Watts & Sergt. 168; 4 Watts 378. But the question here is not that of a partner giving his own paper for a firm debt: it is the case of a surviving partner settling the firm debts.

At law the surviving partner is the sole debtor; he alone can be sued; he alone must pay; the assets of the firm are vested in him to pay with. The assets are a fund for the satisfaction of those debts; the creditors have the right in equity to satisfaction out of those assets. By law, the debt cast on the survivor is a sole and personal debt, and such a claim against him may be joined in an action with a demand personally due by himself. The surviving partner could apply the firm property to pay a note which he individually had given for a firm debt. Why not? He could sell the property for money to pay the debt with; then if he gives his note, even his own note, he can sell the firm property to pay that note with, or even reimburse himself, if he has paid it. He has the full power to dispose of the firm property, and owes only a settlement to the representatives of his partner, a money balance if any be due.

If we were now suing the estate of the deceased partner, there would be more plausibility in the argument; but we are

looking to the firm property only. Suppose the surviving partner had sold all the property at public sale immediately after the decease of Lang, to raise funds to settle the debts, and had afterwards given us his own private note even; where would be the difference in the result? Certainly that would have been a lawful disposition of the property. There were in this case more debts than value of assets; a sale of the property was indispensable in any event. The authorities, in cases of partnership debts, do not treat this subject as in other cases; even among living partners, the partnership liability is not held discharged on light grounds.—Gow on Part. Even in cases where partners give their individual obligations to satisfy firm debts, they are considered as sureties for the firm, and may apply the firm property to pay such obligations. Averill v. Louck, 6 Barb. S. C. Rep. 477; Mosteller v. Best, 7 Iredell's Eq. 39. Where one partner pays for the firm, he has the right to be reimbursed out of the firm property.

The inadequacy of price is alleged as an objection. This objection must be considered in three points of view: 1. Is there such inadequacy of price as would invalidate the sale, and would the objection, as here presented, be sufficient of itself in any case? 2. Are the defendants parties competent to set up such an objection? 3. Would a court of equity, under all the circumstances of this case, deprive the complainant of the property which he has paid for, for which he has given more than it was ever worth, and who did not purchase it voluntarily, or on speculation, but as payment which he could not obtain in any other way, and when he has constantly offered to yield it up, on being refunded what it cost him? We think the case is against the defendants on every one of these propositions.

1. As to the first point: Where there is a public sale, to the highest bidder, the objection does not apply, unless there is some unfairness shown. The mere fact that the price is low, is not, of itself, sufficient. Here no legal objection is shown. It was agreed it should be so sold, and it was sold as agreed, with due notice to all persons. What price would the court require to make it a valid sale? Where is the line or point, under which the sale would be bad, and over which it would be good?

2. But if the objection is a good one, can these parties set it up? Does the price affect them in any way? It did affect McRae, because the sale at a low price left him a large balance of the debt to pay; he, however, made no objection, nor did any one representing him. It did affect Bates, because he did not by this sale obtain full payment of his debt; but he did not stop the sale, nor advertise to re-sell it: he carried out the sale without objection. It affected Ryland still more than it did him; because Ryland was bound to Bates for any deficiency which the property would fail to produce as to the larger debt secured by it. He had a deep interest in the price, but he had full notice of the sale, and would not give more; nor did he question the validity of the sale in any way. Gayle and Phillips, who purchased, voluntarily re-sold it, and they were content with a very small price; yet they knew its value as well as any one. The administratrix of Lang was the party to receive from the surviving partner any surplus or share of the partnership property after all debts were paid, and thus would, if the firm was solvent, have had an interest; but she had full notice of the sale,—the firm was insolvent,—nothing could come to her in any event. She made no objection, and with her we have fully settled. The administratrix is the true representative of the rights of the deceased partner, as we have seen, and if there was any surplus, it would be assets in her hands to pay debts of Lang first, before the distribution to the heirs. Thus, it seems, these appellants have no interest whatever in the question of inadequacy of price. If it had sold for its full value, the result to them would be precisely the same: no part would in any event go to them. The court will not do an idle thing without purpose or object, and entertain litigation where no results can follow.

3. But would a court of equity sustain such an objection in a case like this? Equity will look to the general result, no matter how that result has been arrived at. In this case a result has been attained, which is precisely what a court of equity would have decreed as between the parties to this suit. Waring represents a creditor to whom there was due $15,000 and more. The firm was insolvent, but owned this property. Waring was diligent as a creditor to endeavor to obtain payment of his debt; he has obtained a portion only, and actually

released a part. And this property, worth from $5,000 to $6,000, say the witnesses, he bought at the sheriff's sale for nearly $10,000, under a mistake, supposing he bought the whole interest in it. These payments he has obtained on fully establishing his rights, against the surviving partner, and against the administratrix, and after the most harassing litigations at law and in equity, in all of which the court always gave judgment in his favor. His abandonment of a part of his debt, on settlement with the administratrix, was founded on the then admitted fact, that he had the whole title to the store, which she concedes. By legal construction he was deprived of half the title; but morally and equitably he certainly was entitled to the whole: he had paid a full price for it, and had settled with the administratrix on that footing. Waring then had purchased in good faith, and supposed he owned the whole; and when a doubt was suggested that his deed did not cover the whole, but one half only, he was advised to fortify and supply his title by purchasing the title to the other half from the party who claimed it, which he did. This he had the full right to do, and equity would uphold such a course, and not condemn it.

It is said, the low price of the sale made by Bates was caused by the fact that the property had already been sold by the sheriff, and was claimed by, and was supposed to belong to, Waring; that Bates thought so, and that Gayle and Phillips thought so; and after they had failed to recover on their title against Waring, they sold for a small price to Waring, supposing their title not to be good. Let all this be admitted; we say, Waring also supposed his right to the whole to be complete; but if his purchase did create this belief, this whole matter was based upon his having paid the full value of the whole title. That fact prevents any wrong being laid at his door in a court of equity. A court of chancery would allow him to hold the property in payment of his debt, because that is both lawful and equitable, and will require but one condition of him—that is, that he shall have given adequate value for it. This he has done, and it matters not how or in what shape, so that Lang's estate shall have obtained the full benefit of the fair value; this it has done. Equity will sustain a result which accomplishes that which it would have compelled

if it had been applied to, however unauthorized or illegal may have been the proceedings by which that result is arrived at. Butler v. Merchants' Ins. Co., 8 Ala. 146.

Those transactions involved in the former case, then—that is, the purchase at sheriff's sale, and settlement with the administratrix—are not set forth here as creating sufficient title, but merely to satisfy the court in its discretion, and to show that it should not act on any question of inadequacy of price, because it would not be right, but would be wrong to do so. We suffered already by our misconception of the law, when we were told that, though we purchased the whole of the sheriff, we obtained only one half, and had no return of part of the price, or means of obtaining it back. Now, if we have purchased a good right, at a low price, the equities are balanced and satisfied. The rule should work both ways; and the result of the whole is, that we have paid the full value fairly for the property, and there is in fact no inadequacy of price.

The fact of the litigation, settlement and compromise made between Waring and the administratrix of Lang, is, and should be, conclusive against the claim of the heirs of Lang, there being no collusion on her part; because, as we have before insisted, the heirs could never in any event take anything out of the partnership property, except by way of distributive share from the administratrix of Lang's estate, in a general distribution by her, after satisfying all Lang's debts. Hence her act is conclusive. She was the proper party to claim of the surviving partner the proper balance coming to Lang's estate, if any, and that in money; and she alone could compel him to account in equity. This position, it seems to us, shows that the heir has no interest in the question in this case, and cannot be heard here. It results that this whole transaction having been litigated, decided, compromised and settled, and acquiesced in by the surviving partner, the administratrix, and the conflicting creditors and purchasers,—the whole matter is closed, and these heirs have no interest whatever in the subject in any way. They hold the legal title as bare, naked trustees, for our use, and without any interest whatever in themselves, and are bound to convey to us.

CHILTON, C. J.—1. A bill between these same parties was dismissed by this court at a previous term (17 Ala. 145), but without prejudice as to any supposed right which the complainant might have acquired in virtue of his purchase from Messrs. Gayle & Phillips. The effect of such reservation in the decree of dismissal is, to prevent such decree from constituting a bar to another bill brought upon the same title; but it by no means compromits the court as a judicial determination in favor of such title. In so far as the former decision leaves the questions for discussion open, we must address ourselves to them as though they were for the first time before us.

2. After much vacillation by the English courts, the doctrine may now perhaps be considered settled, that, unless there is something in the articles of copartnership, or some agreement by the partners to the contrary, real estate purchased with partnership funds, for partnership purposes, is, in a court of equity, converted, and treated as personalty, and therefore goes to the personal representatives, and not to the heir of the deceased partner.—See Bisset on Part. 55-6; Coll. on Part. (3d edit.) 141.

While the decisions of the American courts generally concur in affirming that such estate is, in equity, chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, there is much conflict among them, as to whether the surplus, in case of the death of a partner, shall descend to the heir as real estate, or go to the personal representative for distribution.

Judge Story, in Hoxie v. Carr, 1 Sum. R. 183, inclined to the opinion, that the disposition of the surplus of such real estate must depend on the presumed intention of the deceased partner, as to whether it should be treated as realty, or impressed with the artificial character of personalty. In his work on Partnership, however, (§ 93,) he leaves the question unsettled, and says that, from the diversity of judicial decision, the doctrine is open to many distressing doubts. In his work on Equity Jurisprudence, he sides with the English doctrine.

Chancellor Kent follows the English cases, and holds, that "the property will be entitled to be distributed as personal

estate."—3 Kent, (6 edit.) 37. Chancellor Walworth, in Buchan v. Sumner, 2 Barb. Ch. R. 200-1, held, and thought the American cases, many of which he cites, might be considered as establishing, that, as between the personal representatives and the heirs-at-law of a deceased partner, his share of the surplus of the real estate of the partnership, which remains after paying the debts thereof and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate.

Without citing the numerous authorities upon this subject, which may be found collated in those above referred to, we think the true rule is, that, although a court of equity considers and treats real property, purchased with the copartnership funds, and held for the purposes of the firm, as constituting part of the stock of the firm, it leaves the legal title undisturbed, except so far as it may be necessary to protect the equitable rights of the respective partners. Such was the opinionof Chancellor Walworth, in the case last cited (2 Barb. Ch. R. 206.)

3. We do not well see upon what principle the courts have ever held that the heirs of the deceased partner are but naked trustees of the legal title, without any beneficial interest. True, they hold as trustees for the surviving partner for the purpose of adjusting the debts and equities growing out of the partnership relation; but they have an ultimate *interest*. The purposes of the partnership accomplished, and the liens and equities adjusted, they are the sole beneficiaries of their ancestor's share. But, if we concede that they cannot take the surplus directly as heirs, and hold that it must pass through the hands of the deceased partner's personal representative, even then we are not prepared to say, that they are so wholly without any beneficial interest as to deny them the privilege, when sued for a divestiture of title, of showing that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity should not sanction.

The court, it seems to us, will not be astute in ferreting out their interest, as to whether it is certain or uncertain, immediate or remote, in order to shut the mouths of the heirs. They are the only parties sued, and the court ought not to become active in divesting them of their *legal* title, which, by

operation of law, may possibly become united with a perfect equity, in favor of any one whose claim to relief cannot stand before their assault.

The former opinion in the case between these parties, (17 Ala. 145-66,) is conclusive upon this point; for, if the survivor has the unqualified right to dispose of the real estate of the firm, and the heir may not gainsay it, upon what principle could the court look into the consideration of the mortgage deed, and question the power of the survivor to execute notes in the name of the firm as the evidence of the demands secured by the mortgage? The complainant was a derivative purchaser, exhibiting the mesne conveyances, from the survivor, of the entire land or lot of ground. The survivor made no complaint; and if he had the right to appoint the person to take the legal title, irrespective of the nature and objects of the transfer, who shall interpose? The case just cited furnishes the answer: the heirs did interpose, and with success.

4. It is no answer to their right to defend, that the firm is insolvent, and that the whole of the assets of the firm are required to pay the debts. The surviving partner is not calling for this land, as assets of the firm, to administer it for firm purposes. If the disposition which he has made of it amounts to a proper and legal administration of it for the objects of the firm, of course the court will uphold it; but, on the other hand, if the disposition is unlawful, or such as good faith requires should not have been made, the court will find in the insolvency of the firm, which may have been superinduced by such mal-administration, an additional reason for withholding its aid. If this estate has never been properly disposed of, and yet remains as assets of the firm, we cannot undertake to say that the firm will be finally insolvent. It is an event dependent, it may be, upon the amount which this property may bring, and which the future alone can develop. Upon the whole, we think the heirs should be allowed to discuss the plaintiff's right.

5. In Andrews' Heirs v. Brown's Adm'rs, 21 Ala. 437, it was held, that as the surviving partner is charged with the payment of the debts of the firm, he has the right, in equity, to dispose of the real estate owned by it for that purpose;

and that, although his deed will not convey the legal title to the purchaser, yet it will convey this equity to him, and through it he may compel the heir to convey the legal title. Whether this proposition, thus broadly asserted, as respects the right of a surviving partner to execute a mortgage upon the real estate of the firm, can be supported as correct law, we will not now inquire. It was certainly not intended to establish the doctrine that a court of equity, in all cases of disposition by a surviving partner of the real estate of the firm, however unfair, inequitable or unauthorized such disposition might be, would compel the heirs to convey, and thus become the minister of injustice. Such a doctrine would be monstrous, and could never obtain in a court which administers justice upon the broad principles of equity and good conscience.

6. Without intending to affirm the correctness of Andrews v. Brown, *supra*, but conceding, for the purposes of this argument, that the surviving partner has the power to make a mortgage, *subject to the confirmation of the court of equity*, and that if the sale be fair and *bona fide*, such as the court would have sanctioned and sustained, if it had been made under its own direction, the same would be upheld and the legal title decreed to the purchaser; yet, if it be for a grossly inadequate consideration, and made under such circumstances as were well calculated to cause it to be sold for an almost nominal sum, the court ought not to lend its aid to perfect such a purchase. Especially should it withhold its action, when invoked by one whose conduct has contributed, in all probability, to bring about the sacrifice.

7. There are several circumstances connected with this transaction, which account for the sacrifice, as they were well calculated to cast a cloud over the title, if not to deter all persons from bidding for the property when it was sold under the mortgage. In the first place, the mortgage was made by McRae alone, and it does not purport to convey in terms the interest of the deceased partner. It was made while Bartlett & Waring had judgments against McRae, as survivor of the late firm, for a large amount. Then it was made to secure the payment of notes executed by the surviving partner in the name of the late firm, which, as previously decided, (17 Ala., *supra*,) created no obligation as against the firm. Add to all

this, that before the sale under the mortgage, which took place the 4th May, 1840, the lot had been sold under the judgments of Bartlett & Waring, whose judgments were older than the mortgage, and purchased by Waring on the 4th March, 1839, who took and held possession when the sale under the mortgage was made,—and it is by no means surprising that the lot, proved to have been worth some eight thousand dollars, should have been sold for two hundred and fifty dollars.

It occurs to us, that, if there ever was a case where good faith required the surviving partner to resort to equity to have the estate disencumbered, so that the purchaser might know what interest he was buying, and that the property might not be sacrificed, this was one of that character.

This is not an application to chancery to set aside an executed contract for inadequacy of price,—in which case, it is conceded, the inadequacy must be so gross as "to shock the conscience of the chancellor, and be evidence of fraud,"—but it is an appeal to the equity of the court to sanction an act done by another, which is of no validity without such sanction. It is, in effect, the adoption as its own of the act of the surviving partner, who, without its aid, cannot make a valid disposition of this property; and as it is too clear to admit of any doubt, that injustice has been done, by the sacrifice of the property for an almost nominal sum compared with its true value, we are clearly of opinion the court should not sanction it, nor disturb the legal title by reason of it.

Other considerations are relied upon by the complainant to strengthen the moral justness of his claim; but we know of no rule of law or equity which will enable us, as chancellors, to make the complainant's previous improvident purchase, or his liberal compromise with the widow and representative of the deceased partner, any ground for a decree on this title.

8. As to the purchase made by the appellee at sheriff's sale, it is only necessary to say, the maxim is "*caveat emptor*," and that in such cases this maxim applies as well in equity as at law. He then took by that purchase only the share of the surviving partner, and the amount bid must be regarded as the price of that share.

Upon the whole, our conclusion is, that the complainant shows by the record no case for the relief he seeks, and that the decree of the chancellor is erroneous. Let the decree be reversed, and the bill be here dismissed.

CUNNINGHAM *vs.* FONTAINE.

1. When a judgment entry is amended *nunc pro tunc* during the pendency of a writ of error, and the amendment brought up on *certiorari* previously sued out, the amended judgment is properly before the court.
2. To charge the separate estate of a married woman, under the act of 1850 (Pamph. Acts 1849-50, p. 65), with "articles of family supply," the declaration must allege that she holds her separate estate either under the act of 1850, or that of 1848, to which it is an amendment: an averment, that she has a separate estate "which came to her after the first day of March, 1848," is not sufficient.
3. If the husband dies before suit brought, the right of action survives against the wife, for articles of family supply, under the act of 1850.

ERROR to the City Court of Mobile.
Tried before the Hon. ALEX. MCKINSTRY.

ASSUMPSIT by Robert C. Cunningham against Eliza Fontaine. The declaration contained three counts, the first of which is the common *indebitatus* count for goods, wares and merchandise furnished by plaintiff to defendant at her special instance and request. The second count alleges, that the defendant, at the time the goods, &c., were delivered, was the wife of one B. B. Fontaine, and that they lived together as man and wife in this State; that while they were thus living together as man and wife, and supporting and maintaining a house, plaintiff furnished to them, at their special instance and request, "certain articles of family supply, used in their family, such as tea, sugar, &c., which were suitable to the condition in life of their family, and for which the husband would be liable at common law, of the value of $500; and plaintiff avers, that, at the time said articles were furnished, the said defendant (then the wife of said B. B. Fontaine, as

aforesaid,) was possessed of separate property, separate and apart from the estate of her said husband, and which came to her after the first day of March, 1848; which said sum of $500 the said B. B. Fontaine and Eliza his wife so became liable to pay to said plaintiff upon request, &c.; that the said B. B. Fontaine afterwards departed this life, leaving his said wife Eliza surviving him; and the said Eliza, after the death of her said husband, was also liable to pay said sum of money, and being so liable, undertook and promised to pay, &c. The third count alleges, that said Fontaine and wife were indebted to plaintiff for articles of family supply, furnished to them by plaintiff, at their special instance and request, during the lifetime of said Fontaine, and being so liable, they promised to pay; that said Fontaine afterwards died, and defendant, after his death, became liable for said debt, and promised to pay, &c.

The judgment entry recites, that the defendant demurred to the declaration, and her demurrer was sustained, and thereupon the plaintiff was forced to take a non-suit. A writ of error was sued out on this judgment, and at the January term, 1853, the plaintiff assigned for error, 1st, the judgment of the court below on the demurrer to the second count; 2d, the judgment on the demurrer to the third count; 3d, the judgment on the demurrer to the declaration. On these assignments of error, the judgment was reversed, and the cause remanded; the court holding, that, as the demurrer went to the whole declaration, and as the first count was good, the demurrer should have been overruled. On a subsequent day of the term, a re-hearing was granted, and a *certiorari* was awarded to complete the record, on the 8th August, 1853. At the May term, 1854, of the City Court, the judgment entry was amended *nunc pro tunc*, so as to show that the demurrer was only to the second and third counts, and not to the whole declaration; and the amended record was sent up to the June term, 1854, as the return to an *alias certiorari* issued at the preceding January term of the Supreme Court.

P. Hamilton, with whom was C. W. Rapier, for plaintiff in error:

The demurrer to the whole declaration should have been

overruled, as the first count is unquestionably good.—8 Ala. 45; 1 Stew. 580.

The merits of the second and third counts depend upon the construction of the acts of 1848 and 1850 relating to married women. The second count states all that is necessary, and then avers that the wife (the defendant) is the survivor. The decision of the court below was, that the wife surviving is not suable for supplies furnished the family during the life of the husband. The language of the statute is, that "the husband shall be severally, and the husband and wife jointly, liable and suable at law." The plaintiff submits, that the common incidents of a joint contract and liability attach to the liability created by these statutes. The vendor of family supplies may, at his option, treat his demand as joint against both husband and wife, or several against the husband. In this case, by his action, he treats his demand as a joint liability. Upon the death of a joint contractor, the action lies against the survivor, and he is suable alone.—1 Chitty's Pl., p. 50, and authorities cited; 1 Barn. & Ald. 29; 3 Brod. & Bing. 302. The declaration may, or not, allege the death of one of the parties; it is usual to do so in one of the counts.—1 Chitty's Pl., *supra.* No good reason can be perceived for departing in this instance from the general rule on the subject. In doing so, one object of the law would be defeated, and the creditor be deprived of the security which the statute intended to give him—i. e., the right to obtain payment of such demands out of the wife's separate estate.

On the amended record: It appears that the judgment entry and the statement of the pleading in short differ, as to the extent of the demurrer. Which shall govern? It is submitted, that the judgment entry must prevail; it imports absolute verity. The judgment *nunc pro tunc* was rendered in May, 1854; while the *certiorari* under which it is brought up was awarded at the preceding January term, on motion of the defendant in error, to bring up a complete record. This judgment, then, is not properly before the court. The writ was to certify what the court below *had done*, and not what it *might afterwards do;* the subsequent action of the court below could not be certified on such a writ. But what right had the court below to alter its record? The record of the case

had already been removed into this court; its power over the case was gone, until the cause had been remanded by this court.—4 Ala. 1.

DANIEL CHANDLER, *contra:*

At common law, the legal existence of the wife is not recognized; she and her husband are one; her contracts, except when the law presumes that they were made by the authority of her husband, are null and void; she cannot make contracts and sue for their recovery in her own name, nor can she be sued separately and apart from her husband. Does the act of 1850 (§ 7) permit her to be sued, after the death of her husband, for stores and provisions furnished to them jointly during his life? This statute changes the common law; its language is plain and explicit; a liberal construction against its language and meaning must obtain, to authorize such a suit. The death of the husband gives the creditor no authority to sue the wife, at law, on such a contract: to reach her separate property he must go into chancery. The last clause of the seventh section confirms this view of the case.

The third count is clearly defective: it contains no averment that the wife had a separate estate, and was therefore liable. This averment should be distinctly made. Her liability is a special one, and the special facts which render her liable should have been stated. This count does not do this, and therefore the demurrer to it should have been sustained.

Does the second count remedy this defect, and supply this omission? Only partially. It contains an averment that the wife had a separate estate, but is not sufficient to make her or that estate liable, as it does not show that she held it under the provisions of the act of 1850, or that of 1848 to which the last act is an amendment. She might have acquired her separate estate, "after the first of March, 1848," in some other manner than under the provisions of either act, and it would then clearly not be liable. The demurrer to this count was properly sustained.

GOLDTHWAITE, J.—The original judgment entry in this case recited, that the defendants had demurred to the declaration, and a judgment in favor of the defendants on the

demurrer. Upon this judgment a writ of error was sued out, during the pendency of which a motion was made in the court below to amend the judgment *nunc pro tunc*, so as to show that the demurrer was to the second and third counts, and not to the declaration generally. This motion was granted, the judgment amended, and the record as amended brought up by *certiorari*. It is urged on the part of the plaintiff in error, that the judgment *nunc pro tunc* is not properly before this court; but under our decisions this position is not tenable. In Horne v. Moore, 5 Ala. 234, the service of a writ had been accepted by the defendant, but the acknowledgment of service was not entered on the record. The omission was corrected by motion in the court below, while the writ of error was pending; and it was held, that the amendment, when made, related back and sustained the judgment. In several other cases, it appears to have been the practice of this court to recognize amendments made in the judgment of the court below, during the pendency of the writ of error (Brown v. Torver, Minor's Rep. 370; Evans v. St. John, 9 Porter 187; Hefflin v. McMinn, 2 Stew. 492); and as the judgment entry could be amended only so as to speak the truth, and upon evidence of the highest and most conclusive character, and as it relates back and stands in the place of the first judgment, we see no hardship or injustice in recognizing it in this court as the true judgment, which in legal effect it really is.

Regarding the record as presenting the amended judgment for the consideration of the court, the only question is as to the sufficiency of the second and third counts of the declaration.

The second count is framed under, and in reference to, the seventh section of the act of the 13th February, 1850, (Sess. Acts 1849-50, p. 65,) which is in these words: "That for all articles of family supply, or used in the family, which are suitable to the estate and condition in life of the family of such husband and wife, and for which the husband would, by the common law, be liable, the husband shall be severally, and the husband and wife jointly, liable and suable at law; and the separate estate of the wife, secured to her under the provisions of this act, or of the act to which this is an amendment, shall be subject at law to all debts, contracts and engagements for such articles, by suit against her and her husband." The act

to which this is an amendment was passed on the 1st March, 1848, and contains no provision which it is necessary for us to consider in reference to the points presented in this case.

In the case of Henry and Wife v. Hickman, at the January term, 1853, (22 Ala. 685,) it became necessary for us to examine the section of the act above cited. The question in that case arose, as it does in this, on a demurrer to a declaration against husband and wife, on a demand arising out of the purchase of family supplies; and we held, that to render the declaration good, "it must distinctly appear by it that the wife has a separate estate which is sought to be charged, before any liability appears against her, and before she can have a standing in court." The declaration in that case contained no such averment, and the demurrer was sustained. The count in this declaration, which we are now considering, contains an averment, "that, at the time said articles were furnished, said defendant (then the wife of the said B. B. Fontaine, as aforesaid) was possessed of a separate property, separate and apart from the estate of her said husband, and which came to her after the first day of March, 1848." Does this averment satisfy the demands of the statute, and the decision of this court under it, in the case of Henry and Wife v. Hickman, *supra*?

It evidently was not the intention of the Legislature to charge every kind of separate estate which could legally be created in the wife, with the payment of such debts, but only those which are secured to her by the acts of 1848 and 1850, and which she received and enjoyed under their provisions. The language of the act of 1850, upon this subject, is much too plain for misconception. Its words are, "And the separate estate of the wife, *secured to her under the provisions of this act, or of the act to which this is an amendment*, shall be subject at law to all debts, contracts, and engagements for such articles, by suit against her and her husband." A separate estate created by deed or will, either before or after her marriage, cannot, with any propriety, be said to be secured by these acts, whether such estate was created anterior or subsequent to their passage; and this, for the obvious reason, that these estates are not such as, without the statutes, the husband would have taken in his own right, and as she has received none of the benefits of these acts, she should not be

made to bear the burthens imposed by them on those who do receive such benefits. If she holds her separate estate under the provisions of a deed or will, and the sanctions of the law as it stood before the passage of the act of the 1st March, 1848, it can only be charged in such manner, and with such debts, as the law then existing prescribed and sanctioned. The remedy here resorted to was unauthorized by the law, as it then stood, for such demands as are here sought to be recovered.

The remedy given by the act of 1850 is in derogation of the common law, and, consequently, must be strictly pursued. In order to enable the plaintiff to recover, he must prove, that the articles furnished were family supplies, that they were furnished during the coverture, and used in the family, and further, that the wife had *a separate estate secured to her under the act of* 1848 *or* 1850. On the plea of *non assumpsit*, the defendant would be entitled to a verdict, without producing any proof, unless all these facts were made out by the plaintiff; or upon a demurrer to the testimony, if either had not been proved, she would be entitled to a judgment. This being the case, it is obvious that a declaration, which does not aver the existence of all of them, is fatally defective; for it is a familiar rule of practice, that the *allegata et probata* must correspond. Proof that the defendant had received a separate estate since the 1st March, 1848, without showing that it was secured to her by that act, or the act of 1850, would not authorize a recovery; for it would not necessarily follow from the fact that she had received a separate estate, that such estate was secured to her under these acts—it may have been settled on her by will or deed, and held and enjoyed by her entirely independent of these statutes. We hence conclude, that a declaration which merely avers that the wife possessed a separate estate, held in her own right, without the further averment that it was secured to her by the act of 1848 or 1850, (as the fact may be,) is fatally defective, and justly obnoxious to a demurrer. Such is the case here, and our opinion is, the demurrer to this count was rightly sustained.

In the case of Henry and Wife v. Hickman, *supra*, the declaration contained no averment whatever that the wife had a separate estate, and the general language employed by the

court was all that was necessary to show the defect; in this case, there is an averment of a separate estate held by the wife, and the necessity consequently arises of deciding whether the averment is sufficiently certain to show that it is such a separate estate as, under the act of 1850, is chargeable at law with the payment of debts contracted for family supplies by the husband during the coverture. There is, therefore, no conflict between the cases.

It is contended, however, that if the declaration contained the averments which are proper, still no recovery could be had against the wife, after the death of the husband, inasmuch as the statute prescribes that she shall be sued jointly with him, and the right of action does not survive against her on his death. We cannot give our assent to this proposition. The statute creates a *liability* on the part of the wife to pay such debts, and gives a remedy to enforce it. Its requisition, that during the coverture the wife shall not be sued separately from the husband, but that both shall be joined, is but the enactment of an old canon of the common law, and should not be extended beyond it. By this, if the liability was that of the wife, and the creditor sought to enforce it during the coverture, he must join the husband; but if the wife survive the husband, she may be sued alone. So here, the wife is jointly liable and suable with the husband while the coverture exists, and shall not be sued without his being joined in the action; but if he die before suit, the liability survives to her, and the creditor's remedy is against her alone.

There is nothing in the act which exempts the joint liability created by it from the rules which govern such liabilities at common law; and it is well settled, that in case of the death of one joint obligor or contractor, the action lies against the survivor. In such cases, it is not absolutely necessary to allege the death of one of the parties, although it may be and generally is done, in one count of the declaration.—1 Chit. Pl. 50-51; 1 Barn. & Adol. 29. Without a clear expression of legislative intention, we would be unwilling to exempt this class of cases from the general rules of law; and we can perceive no such intention in any of the provisions of the acts of 1848 and 1850. It would be extraordinary to allow the death of the husband to defeat the *liability* of the wife, under

a statute, from the very words of which it is evident the Legislature intended to multiply the creditor's securities at law for the payment of his debt, by creating a legal liability on the part of the wife which had no existence until the passage of the act of 1850.

Again; there can be no reason for sending the creditor into chancery, in order to charge a female with the payment of her legal liabilities, unless she be *covert*, and possess a separate estate, which is vested in a trustee, and her husband is insolvent. But when she is discovert, and in the enjoyment of her estate, which she has the right to control or charge as she pleases, a court of equity is without jurisdiction to enforce a legal demand against her. In such cases, if the death of the husband takes away the remedy at law against her, she cannot be proceeded against in any forum, and by his death is discharged from all liability. Such a result would, we apprehend, scarcely be seriously contended for.

From what has been said with respect to the second count, it is obvious the third count of the declaration is bad. This is also intended to conform to the act of 1850, but it contains no averment of any separate estate in the wife, and is fully disposed of under the ruling of this court in the case of Henry and Wife v. Hickman, *supra*.

There is no error in the record, and the judgment is consequently affirmed.

SHERROD'S EXECUTORS *vs.* HAMPTON.

1. When a *scire facias* to revive a suit is issued against several executors, and executed on all save one, there is no discontinuance in proceeding without him, if the record does not show that he ever qualified; and if the record shows that he died several terms before the trial was had, and that the cause was afterwards treated by all the parties as regularly in court, the irregularity (if any) is cured, and cannot avail on error.
2. A railroad company, of which both plaintiff and defendant were directors, transferred to the former, by resolution of the board of directors, a quarter's pay due from the Postoffice Department on a contract for carrying the mail,

(which contract was in defendant's name,) as collateral security for his endorsement of a note for the benefit of the company, which he subsequently paid; and afterwards, by another resolution, transferred the same quarter's pay to defendant for the purpose of paying other debts, which defendant accordingly paid: *Held*, that plaintiff might maintain *assumpsit* for money had and received against the defendant, to the amount paid on the note.

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. GEO. D. SHORTRIDGE.

ASSUMPSIT, on the common money counts, by Manoah B. Hampton against Benjamin Sherrod. The defendant having died pending the suit, a *scire facias* was awarded to bring in his personal representatives, W. W. Watkins, Richard Jones, and Frederic A. O. Sherrod, which was returned "executed" as to Watkins and Jones, and "not found" as to Sherrod.—After several continuances and a change of venue, a trial was had at the October term, 1853, when, as the judgment entry recites, the death of said F. A. O. Sherrod was suggested, and the suit thereupon ordered to stand revived against the surviving executors; and a judgment was then rendered, on the verdict of a jury, in favor of the plaintiff.

The bill of exceptions, taken by the defendants, is as follows:

"When this case was regularly called, L. P. Walker, an attorney of the court, suggested to the court, as *amicus curiæ*, that the cause was discontinued, by the failure of the plaintiff to issue an *alias sci. fa.* against F. A. O. Sherrod, one of the executors of said Benj. Sherrod, on whom the original *sci. fa.* was (*not ?*) executed. But the court overruled said suggestion, and held that the case was properly in court; and therefore exception was taken to this action of the court. It was admitted that Sherrod had died in the fall of 1848.

"On the trial of said cause, there was evidence tending to show that, at the request of David Deshler, who was then the general superintendent and treasurer of the Tuscumbia and Decatur Railroad Company, a note for $1000 was executed on the 16th of September, 1840, by Reese, Fennell & Banks, dated September 16th, 1840, payable six months after date to David S. Goodloe, Sr., and endorsed by said Goodloe, M. Tarver, and M. B. Hampton; that said note was executed and endorsed for the benefit of said railroad company, and

was discounted for its use and benefit at the Decatur Bank, and the said company received the money therefor. The plaintiff then produced the minutes of the said railroad company, and read therefrom a resolution passed by the board of directors at a meeting held on the 18th of September, 1841, which is as follows: "Resolved, that the fourth quarter of the present year, due by the Postoffice Department, be transferred to M. B. Hampton, as collateral security on his endorsement on a note of $1000 made by Reese, Fennell & Banks, also a note for $100 made by W. A. Aiken, and two notes made by Greenville Burnett for $61 50." The plaintiff then introduced evidence tending to show that he paid off said note for $1000 to the Decatur Bank on the 8th September, 1842. The defendants then read in evidence from the said book of minutes a resolution passed by the said board of directors on the 16th February, 1842, which is as follows: "Resolved, that the said railroad company appropriate to the use of Benjamin Sherrod the proceeds of the two last quarters that may be due the company for the transportation of the United States mail, for the purpose of paying the following debts, viz., one due the Huntsville Bank for $900, one due T. Saunders for $300, for the hire of one negro two years, and one due John W. Swoope for $300, for the hire of negroes in 1841; making in all $1500." They also introduced evidence tending to show that, before the date of the last resolution, said Sherrod had assumed to pay the debts named in the resolution, and that he afterwards did pay them. It was in proof, also, that the draft from the Postoffice Department for the fourth quarter of the year 1841 bore date the 18th of March, 1842, and was made payable to said Benj. Sherrod, the said contract for carrying the mail being in his name; and the said check was handed to said Sherrod by said witness, who was superintendent and treasurer of the company; that Sherrod took it, and said that he would keep it as he had money to pay to the sheriff about that time, which the proof tended to show was the money mentioned in the last resolution in his favor. Said Sherrod refused, on the application of said Hampton made after the receipt by him of said draft, to transfer the same to him, or to pay over to him the proceeds, but received the same himself. At the time said

resolutions were passed by the board of directors, both Sherrod and Hampton were members of the board; at the meeting at which the first resolution was passed, Hampton was present, and Sherrod absent; and at the meeting at which the second resolution was passed, Sherrod was present, and Hampton absent.

"On this state of proof, the court charged the jury, that the whole case turned on the question, whether or not Hampton had paid off said note for $1000; and if they found from the evidence that he had paid said note, then they must find for the plaintiff. The defendants excepted to this charge, and also to the ruling of the court on the motion for a discontinuance;" and they now assign these rulings of the court for error.

L. P. WALKER, and BELSER & RICE, for appellants:

I. The resolution of the 18th September, 1841, of the board of directors, was not a transfer, *per se*, of any interest, either legal or equitable, to Hampton, for the following (among other) reasons, to-wit: 1. The charter of the company does not authorize any such transfer, or any transfer to be made in any such manner.—See the charter; Spyker v. Spence, 8 Ala. 333. 2. The resolution purports to transfer "the fourth quarter of the present year, due by the Postoffice Department." This is void for uncertainty. What is "the fourth quarter of the present year due by the Postoffice Department"? To whom is that fourth quarter due by the department? The court cannot add to or vary the terms of the written resolution. 3. If it was intended by the resolution to transfer a claim held by a contractor, on the Postoffice Department, then it is contended that such contractor cannot transfer such claim,—especially before it is due, before the end of the quarter, and before the service is performed by the contractor.—It is against public policy, and such transfer is of no force, at least until assented to by the department.

II. But if the resolution was a transfer of any interest, it was not a legal interest, but merely equitable. 1. "The railroad contract for carrying the mail" was in the name of Sherrod, (the original defendant in this suit,) who therefore held the legal title to all the money to be paid by the department

on the contract. The company, not having the legal title, could not transfer it by resolution or otherwise. 2. But if the contract for carrying the mail had been in the name of the company, and the resolution operative as a transfer, still such transfer could not invest Hampton with the right to sue the department or Sherrod, in his (Hampton's) own name. The suit, if maintainable, should, in that case, have been in the name of the company, for the use of Hampton.—Gookin v. Richardson, 11 Ala. 889. 3. Hampton was last endorser on the note. Sherrod was not a party to it. Sherrod and Hampton were both members of the company and the board. The note was to raise money for the company. There was no express contract, or express promise, between Hampton and Sherrod. Hampton founds his right on his endorsement of the note, and on his payment of the note. But he did not pay until 8th September, 1842—long after Sherrod had received the Postoffice draft and the money thereon—which issued in his name as contractor—and long after another resolution of the board appropriating the very claim to Sherrod which Hampton is seeking to recover from Sherrod. On the facts as proved, Hampton could not maintain the action, for there was no express promise to pay him, and the law would not imply one. It is clear Hampton did not legally own the money at the time Sherrod received it; and therefore the law cannot imply the promise to pay him.—Br. B'k at Montgomery v. Sydnor, 7 Ala.; Westmoreland v. Davis, 1 Ala.; Chenault's Adm'r v. Walker, 22 Ala. R. 275, 286; Tipton v. Nance, 4 Ala. 194.

3. The charge of the court is clearly erroneous,—for it gives Hampton a right to recover merely because he paid the note for $1000—a note which he had endorsed, and which, of course, he was legally bound to pay. Such payment alone cannot create in him a right to recover from Sherrod, who was not even a party to the note, and in no manner liable for its payment.

4. The suit was discontinued.—Drinkard v. The State, 20 Ala. 9; Griffin v. Osbourne, *ib.* 594.

WATTS, JUDGE & JACKSON, *contra:*

1. The action was not discontinued.—See Moore & Jones

v. Davidson, 18 Ala. 209, and the authorities there cited.—But, if at one time discontinued, this was waived by the appearance of the parties without objection.—See Kennedy v. Jackson, Minor's R. 137 ; Gilbert v. Lane, 3 Porter 267 ; Hair v. Moody, 9 Ala. 399.

2. Upon the facts stated in the record, it is clear that the plaintiff below had a better title to the money collected than the defendant's testator. Hampton was first in time, and has the best right.

3. It was not necessary that the charter of the corporation should, in express terms, authorize the transfer : this power is incident to the corporation, and may be exercised at any time, unless restricted by the charter.

4. The right of Hampton to recover the money is well established by principle and authority. When one man has money in his possession, which *ex æquo et bono* belongs to another, the latter may maintain an action in his own name to recover it, and the law implies the privity and promise.—See Hitchcock v. Lukens, 8 Porter 333 ; Gayle v. Benson, 3 Ala. 234 ; Houston v. Frazier, 8 *ib.* 81 ; Wilson v. Seargent, 12 *ib.* 221 ; Thompson v. Merriman, 15 *ib.* 166 ; Smith v. Tankersly, 20 *ib.* 212, and other authorities *passim.*

CHILTON, C. J.—1. There was no discontinuance by reason of failing to make F. A. O. Sherrod a party defendant ; for, although a *scire facias* issued against him as one of the executors, the record fails to show that he ever qualified as such ; but conceding that he did, it is shown that he died many terms previous to that at which the trial was had, and the cause was treated as regularly in court by all the parties in changing the venue, and divers continuances. We should be inclined to hold, that this was a waiver of the irregularity, if it was one ; but the death of F. A. O. Sherrod, before any objection was taken, frustrated it ; and as the proper parties were before the court when the case was tried, and for many times previous, the supposed irregularity has injured no one, and cannot avail as error.—See 18 Ala. 211.

2. There was no conflict of the proof, and the facts were undisputed ; hence the court charged the jury, that if Hampton had paid off the note for $1000, upon which he was surety

for the railroad company, he was entitled to recover. The charge presents the legal question, whether the collection of the money from the Government by Sherrod, after the demand had been transferred to the plaintiff Hampton, by the resolution of the company, of which they were both members, entitles the plaintiff below to maintain this action.

The rule is, where one person receives money which, *ex æquo et bono*, belongs to another, an action of *assumpsit* for money had and received can be maintained by the latter. We think there can be no question, that Hampton is in justice and equity entitled to this money—that is, to the extent of the amount paid by him upon the demand which it was transferred to secure. The subsequent transfer to Sherrod was subordinate to the claim of Hampton; and when the money was received by him, he held it in trust for the purpose declared by the resolution of the company of the 18th of September, 1841.—Sherrod must be presumed to have notice of the resolution of the company, of which he was a director, and to have taken the transfer, which was subsequently made to him, subject to the rights of Hampton, the prior transferree. The recovery by Hampton of this fund, coupled with the resolution of the company which transfers it to him, is a complete protection to Sherrod against any future liability to the company for the same; and as the plaintiff is, as we have seen, in equity and good conscience entitled to it, this action—*assumpsit* for money had and received—lies for its recovery. If the resolution created no privity, the law itself would create both the privity and the promise, as may be gathered from numerous authorities both in this and other courts.—See the cases cited in Huckabee v. May, 14 Ala. 263; Hitchcock v. Lukens, 8 Port. 333; Price v. Pickett *et al.*, 21 Ala. R. 741; Clark v. Dignam, 3 Excheq. R. 478.

Let the judgment be affirmed.

LIGON, J., did not sit in this case.

PERRY *vs.* MARSH.

1. In case, to recover damages for the loss of a slave who was killed while working on defendant's house, if the declaration avers fraudulent concealment by defendant of the dangerous condition of the house, and also fraudulent representations that it was safe, it is not demurrable for duplicity, but the latter averment may be stricken out as surplusage.
2. In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable, precisely as a third person, if the loss or injury is caused by his neglect or want of care.
3. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if it is known to him; and if he fails to make this disclosure, and the workman, while engaged in the service, thereby sustains an injury, the employer is responsible in damages.
4. If the concealment of the danger by the employer amounts to a breach of duty sufficient to support an action on the case for damages, an additional averment of fraudulent intent may be stricken out as surplusage.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE declaration, which was in case, alleges that the slave of the plaintiff below, Marsh, was bound for a term of years to one Sadler, a bricklayer, to learn the trade; that the defendant hired one Coxe, who was in the employ of Sadler, and was his agent, to do certain work near the furnaces and boilers of a building owned by defendant, and used as a cotton press, knowing that the building was unsafe to work in, and that while engaged with the slave in doing the work, the building, owing to the carelessness of the defendant, in not repairing the same, and in permitting it to become unsafe, insecure and dangerous, which was known to the defendant, and not known either to the plaintiff, Sadler, Coxe or the slave, fell, and killed the slave; that at the time Coxe was employed, and at the time the slave was killed, the building was

insecure, and dangerous to work in; that at the time Coxe was employed, and at the time the slave was killed, the defendant knew that neither the plaintiff, nor Sadler, nor Coxe, nor the slave, was aware of the perilous condition of the building, and that the defendant knew it, and fraudulently and with the intention to injure the plaintiff, concealed the same; that the defendant, when Coxe was employed, fraudulently represented to Coxe that the same was safe and secure, and that there was no danger in working in it, &c.

The defendant demurred to the declaration, and the demurrer was overruled.

From the bill of exceptions it appears, that on the trial evidence was offered, conducing to prove that a slave of the plaintiff had been killed while at work as a mason in a cotton press owned by the defendant, by the falling in of the roof; that such slave had been apprenticed by his owner to one Sadler to learn the bricklayer's trade, and was in the possession of Coxe, a master mason, by Sadler's consent; that the defendant had applied to Coxe, as a mason, to do some repairs on the furnace of the engine of the press, within the building, saying that an accident had occurred by the sinking of the furnace, which had broken an iron stand-pipe, but said nothing as to the dangerous condition of the building; that Coxe promised he would go with his hands and do the work. Evidence was also offered, to show that Coxe did go to the building, and examined the work to be done, and then returned with his hands, amongst whom was the slave killed, and went to work. It was also in evidence, that a heavy stack of chimneys, which ran through the centre of the building, had been inclined from a perpendicular line by the sinking of the wall of the furnaces; that the chimneys pressed against the roof, which was of slate, and that the pressure parted the girders which supported the roof, where they had been spliced; that the leaning of the chimney was plainly visible, but that it had not leaned enough to cause apprehension; that the part of the building against which it pressed, had cracks in the wall, which had been there for a long time. There was evidence tending to show that the building was unsafe, and that it was known by the defendant to be so, but the evidence on these points was conflicting.

The court charged the jury, among other things, "that they should inquire if Coxe made any special contract with Perry: if he did not, the presumption was, that the hiring was under the rules applying to ordinary and usual transactions of that nature, and Perry would be liable for the consequences of any ordinary risk; that the law, in such case, presumes the contract was made with reference to the ordinary risks and accidents of life in such employment; but, if there was imminent danger and peril to life in working in the building, and Perry knew this, and Coxe did not know it, and had no means of ascertaining it,—if Perry himself made the contract with Coxe, and did not notify him of the danger, the defendant was liable. Or if, instead of the fact being that Coxe had no means of ascertaining the danger, he might have ascertained it, by examining the building closely and minutely, that unless he was a builder, or a carpenter, or one likely to think of examining the building from his avocations in life, he would only be expected to know such defects as a prudent man would be presumed in law to know." The defendant requested the court to charge:

"1. That when one employs a tradesman to work, it is for the workman to judge of the risk of the undertaking, and do it or not as he thinks fit.

"2. That, although Perry knew there were defects in the building, still, if no representation was made as to its safety, the defendant would not be liable under the declaration in this case.

"3. That, if Coxe examined for himself and asked no questions of Perry, and he made no false statements, the defendant was not liable."

"The court refused said instructions, and charged the law to be as above recited, offering to qualify the charges asked by the defendant as stated in the latter part of his direct charge; to all which instructions so given, and to the refusal to charge as requested, the defendant excepted."

The errors assigned are, 1st, the overruling of the demurrer to the declaration; 2d, the instructions given to the jury; and, 3d, the refusal to give the instructions asked.

GEO. N. STEWART, with whom was E. S. DARGAN, for the appellant. (No brief on file.)

DANIEL CHANDLER, *contra :*

First : As to the pleadings:

1. The demurrer was properly overruled. In an action on the case, it is not necessary to prove all the averments in the declaration: many of them, not being material, may be rejected as surplusage. Allegations of matter of substance must be substantially proved; allegations of matter of description must be literally proved. In this case, the last averment in the declaration, that charging the "fraud," can be stricken out, and a good cause of action still be stated in the declaration. This averment is not of the essence of the action, or descriptive of the act complained of, and may be rejected as surplusage. If the declaration shows a good cause of action, it is sufficient. It may contain immaterial and unnecessary averments; and it not being necessary to prove them, they can be rejected. In this case, the action can be sustained without alleging or proving that the plaintiff in error "falsely and fraudulently represented" the building to be safe. This averment may be rejected, and the declaration will still contain a good cause of action.—2 East 452; 17 John. 98; 73 Eng. Com. L. (Com. Bench Rep., 11 vol., 491,) 141; 3 Bar. & Cr. 2; *ib.* 113; 2 *ib.* 2.

2. The gist of the action is the knowledge of the situation of the building, by the plaintiff in error, and his concealment of it, when he employed our slave to do his work. The motive is not important. Whether the true condition of the building was "fraudulently" concealed or not, is immaterial. Fraud is not the gist of the action. If it were, then there must be a substantial allegation of fraud and proof of it. In this case, the important question is—and the declaration states it—was the dangerous condition of the building known to the plaintiff in error, and concealed from the defendant? If so, here was a breach of duty. The law will infer the motive. It need not be averred or proved, and if averred may be rejected as surplusage.

3. If the whole of the second and third averments, that state the motive and describe the concealment to be fraudulent, are stricken out, the right of the action is not destroyed, but enough remains to make the declaration a good one. The substance of the first averment is, that the building being un-

safe, insecure and dangerous to work in, which was known to the plaintiff in error, but unknown to the defendant, or his slave, he employed the slave, and induced and permitted him to work in the building; and that the building, owing to the negligence, carelessness and neglect of the plaintiff in error in not repairing it, and in permitting it to become unsafe, insecure and dangerous, fell, while the slave was so employed, and at work in the building, whereby he was killed, &c.—This is a good averment. It contains enough to sustain the action. Nothing is said of the motive or intention, of the fraud or misrepresentation. Negligence and neglect in not repairing are alleged: its dangerous and hazardous condition is stated; and all this being known to the plaintiff in error, but not to the defendant; our slave is employed and killed by the falling of the building. The proof is applicable to this state of facts. The charges that were given and rejected apply to this state of facts. If then all the other averments in the declaration be stricken out, the proof of this averment will authorize the judgment. Under it, the question of negligence and neglect arises. Damages can be recovered for the negligence of the plaintiff in error in not repairing the building, and for a breach of duty in putting the slave there to work. The act itself in thus employing our slave, and inducing him to work there, subjects the plaintiff in error to damages. Whether his motive was malicious or fraudulent is immaterial. The act itself was wrong: a breach of duty was committed, and the plaintiff in error is responsible for the consequences.—17 Johns. 98.

4. In the exercise of a lawful right, a person may still be liable for damages. If it is performed under circumstances that show a disregard of the rights of others, and a neglect of a recognized duty, the party is responsible. "In reviewing the cases," says Judge Woodworth, "I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others—when there is no just cause for the charge of negligence, and when the act is not done maliciously." But the converse of this proposition is equally true. A man is answerable for the exercise of a right, when it is accompanied by a disregard of the rights of others, or

when there is a just cause for the charge of negligence, or where the act was done maliciously.—8 John. 421.

5. If this view of the case in reference to the first averment in the declaration is not correct, then the defendant in error can, by striking out as surplusage the allegation of fraud, which is not of the essence of the action, or descriptive of the act, rely on the other averments, which are sufficient to sustain the action. The rule is, "if the averment may be struck out, without destroying the plaintiff's right of action, it is not necessary to prove it."

Second: As to the merits of the case:

1. Coxe, who was employed by the plaintiff in error to do the work, and who had the defendant's negro in his employ, did not know the dangerous condition of the building in which the work was to be done. It was known to Perry. The defects and the immediate cause of the building's falling, were not discoverable by ordinary prudence. The immediate or proximate cause of the accident, was the state of the building—its defects—the pressure of the chimney upon the roof, and the separation of the girders that supported the roof.—The remote cause was a concealed fire under the chimney. The proximate cause was known to Perry, but unknown to Coxe. The remote cause was unknown to both. Was not Perry under both moral and legal obligations to disclose the facts to Coxe? The concealment operated to his advantage and to our injury. The facts that was known to Perry, but unknown to Coxe, in reference to the situation of the building, are material, and being material, he was bound to disclose them. The concealment of a material fact that a party is bound to disclose, is equivalent to the misrepresentation of the fact. The effects are the same.

2. If a man employ me to repair an engine under his building, and knows the building is in a dangerous condition, and I am ignorant of the peril I incur in doing the job, the suppression of such a fact, when the very undertaking of the work implied a trust and confidence on my part that no such danger or peril is incurred, would clearly make the person employing me responsible for the consequences of his act.—"His very silence," to use the language of Judge Story, "becomes expressive of trust and confidence equivalent to an

affirmative." In this view of the case, the plaintiff in error committed a fraud upon the defendant, and a damage to the defendant resulted from that fraud. This is all that is necessary to support the action. Fraud and damage, coupled together, will entitle the injured party to relief in any court of justice.—7 Johns. Ch. 200 ; 2 Kent 481 ; 1 Story's Equity §§ 204 to 219 inclusive.

3. If there was any confidence or trust reposed in Perry, he was bound to make a disclosure of the true situation of the building. There was in this case a legal relation existing between Perry and Coxe. Had a mere stranger gone in the building, and Perry had known the fact, he would have been under no legal obligation to disclose to him its situation.—But Coxe was no stranger. He went there at the instance of Perry, and was employed by him. This establishes a legal relation between the parties, and imposes on the employer the obligation to disclose to the employee the facts and circumstances which render the undertaking dangerous. After Coxe was employed Perry could do nothing, or omit to do anything, that was calculated to mislead or deceive Coxe. Did he not do so? Was not Coxe, by Perry's silence, induced to believe that there was no risk or danger except what was connected with the job itself? Had he been informed of the real facts—had he known that other workmen had refused that day to do the job, because they believed the building was in a dangerous condition, he would, being thus put upon his guard, have examined the building for himself. The concealment of the situation of the building, under the circumstances disclosed by the record, was a breach of duty. Coxe was employed to do a job. There was no danger in the work itself, but there was in the building. This was known to Perry, but unknown to Coxe. The legal relation of employer and employee implies confidence and trust. If a man employs me to do a job, I trust him so far as to presume there is no concealed or unexpected danger in the undertaking. If there is, and it is known to him, but unknown to me, it is a breach of duty if he does not disclose it. If concealed, and injury follows, there is no difference, morally or legally, between the concealment of the fact and the false representation of the fact. They work the same wrong, and proceed from the same

motive. In either case, Perry was guilty of a breach of duty, and is responsible for the consequences. To make him thus responsible, neither a false representation, nor a fraudulent concealment was necessary, but the mere concealment of a material fact, that might have influenced the course and conduct of Coxe, was of itself sufficient. It involves a breach of duty, and a violation of good faith. It destroys all confidence, and makes every man assume all risks and dangers, seen and unseen, known and unknown.

4. In this case, the danger was not in repairing the furnace. Coxe examined that, and he was willing to risk the danger connected with the job he was to undertake. But the danger was in the building, and with that he had nothing to do. He was employed to repair the furnace, not the building, and so far as the building was concerned, he was bound to know only such defects as could be discovered by ordinary prudence.—So far as the furnace was concerned, the job was a safe one. The danger proceeded from causes disconnected with the job he was employed to do. This danger was in the building, and its condition was known to Perry, but unknown to Coxe. Under such circumstances, the duty of Perry is apparent, and his liability is as certain as his concealment of the condition of the building and the risk we incurred was wrong. This view of the case covers all the charges that were given, and all that were rejected.

GOLDTHWAITE, J.—The demurrer was properly overruled. The declaration is in case, and alleges, that the negro of the plaintiff was bound for a term of years to one Sadler, a bricklayer, to learn the trade; that the defendant engaged one Coxe, who was in the employ of Sadler, and was his agent, to do certain brick work about the boilers, within a building belonging to the defendant, used as a cotton-press, which building was unsafe and dangerous, and known to be so by the defendant; that said Coxe took said slave with him, to assist in doing the work, and while engaged in it, in such work, the building, owing to the carelessness and neglect of the defendant in not repairing it, fell, and killed the slave. It also avers, that the dangerous condition of the building was known to the defendant, and unknown either to the plain-

tiff, Sadler, Coxe, or the slave, and that the defendant fraudulently and with the intention to injure the plaintiff, concealed the same. It further avers, that when Coxe was employed to do the work, and when he and the slave commenced the same, neither they, nor the plaintiff, nor Sadler, had any means of ascertaining the dangerous condition of the building; and that the defendant, knowing of its dangerous condition, fraudulently represented to them that it was safe and secure.

The only defect which is insisted upon by the plaintiff in error, is duplicity; but the declaration is relieved from this objection, by considering the last allegation as surplusage only, which we are authorized under the rules of pleading to do, as the whole of it may be struck out, and the declaration still be sufficient.—Williamson v. Allanson, 2 East 452; Panton v. Holland, 17 John. 92.

In relation to the charge of the court, we entertain no doubt, that in ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work which he undertakes, or the service in which he engages, he will be held to all the risks which belong either to the one or the other; but where there is no danger in the work or service by itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer would be answerable, precisely as a third person, if the injury or loss was occasioned by his neglect or want of care. In such a case, the injury would be outside of the employment, and the employer would, as to such injury, be in fact a third person, and fall within the same rule as to responsibility.

We are clear, also, that, without reference to the fact whether the injury or loss was occasioned by the carelessness or neglect of the employer, in not using due care in relation to the cause of the danger (as in allowing the walls or roof of a building to remain, for an unreasonable length of time, in a condition hazardous to the safety of others), if he employs a workman in a service, which is apparently safe, but which becomes hazardous from causes disconnected with the service, and not discoverable by the exercise of ordinary prudence, he would be bound, upon the strongest principles of morality

and good faith, to disclose to those whom he has employed the danger to which they were exposing themselves, if those dangers were known to him; and the failure to make this disclosure, under such circumstances, would be a breach of duty, for which the employer would be held responsible, if, while engaged in the work, the workman sustained an injury. These views are based upon legal principles familiar to all. If a slave is hired without any special contract, the law implies that he is not to be employed in labor or service requiring more than the ordinary exposure; and in all contracts, the suppression of material facts, which one party is bound, in conscience and in duty, to disclose to the other, and in respect to which he cannot innocently be silent, is regarded as evidence of fraud.

To apply these principles to the case before us: The court charged, that if there was imminent danger and peril to life in working in the building;—if the defendant knew that such was the case, and Coxe did not;—and if the defendant himself made the contract with Coxe, and did not notify him of his danger,—in that event, the defendant would be liable. The court also charged, that, if, instead of Coxe having no means of ascertaining the danger, he might have ascertained it, by a close and minute examination of the building, unless he was a builder or carpenter, or one likely to think of examining the house from his avocations in life, he could only be expected to know such defects as a prudent man would be presumed in law to know.

We consider this charge, as simply asserting the legal proposition, which we have already recognized, that where the danger does not consist in the service, but grows out of extrinsic causes, not to be discovered by ordinary prudence, the employer is bound to disclose the danger, if known to him and unknown to the workman.

It is urged, however, on the part of the plaintiff in error, that the *gravamen* of the declaration is, the *fraudulent* concealment of the danger; and that the charge given ascertained the responsibility of the defendant, without reference to fraud. The words of the declaration are, that the defendant, "fraudulently, and with the intention to injure the plaintiff, concealed the true situation of the building, and the danger of working

within it, from" &c. The allegation of fraud, here, is not descriptive, but refers to the intention of the defendant, at the time of the alleged concealment (Panton v. Holland, *supra*); and as the concealment of the danger, under the circumstances alleged in the declaration, was a breach of duty, and therefore sufficient to sustain the action, the averment of the fraudulent intent, was not essential, and may for that reason, as a good cause of action remains without it, be rejected as surplusage. Panton v. Holland, *supra*. In this aspect, as the charge asserted a correct legal proposition, it was free from error. It is not pretended that the other portion of the charge was erroneous.

The views we have expressed, are decisive of the refusals to charge. A false representation was not necessary to maintain the action under the declaration. The record affords no evidence that Coxe did make any examination of the building; and ordinary prudence did not necessarily require him to make inquiries of the defendant as to the condition of the building.

The judgment is affirmed.

Note by Reporter.—A rehearing having been granted in this case, on the application of the appellant's counsel, the cause was re-argued in writing; but the court adhered to its first opinion.

Mr. Dargan, for the appellant.—The principles asserted in the opinion, as I understand it, I do not controvert, but I do not think they cover the whole case. The last charge requested by the defendant below is clearly governed by a principle entirely different, and I think it ought to have been given. No one will deny, that, if a carpenter or mason is employed to repair a building, the defects of which are open to common observation, and he examines the work to be done, and, without asking any questions, agrees to do it,—he then judges for himself, and assumes the risk incident to the repairs; unless, indeed, there is some secret or hidden defect or danger, which is known to the employer, but unknown to the workman, and the injury results from this secret source of danger. I take the rule to be this, that fraud and injury must both concur, to give a right of action in such a case. For

instance—if no injury had resulted from the secret danger, there could have been no right of action; or, if the employer had disclosed the secret danger, there could have been no action against him, although the injury resulted from that danger. The correct rule is laid down by C. J. Kent, in Upton v. Vail, 6 Johns. 180, where it is said, "Fraud, or deceit, with damages, gives a cause of action;" but if either is wanting—that is, either the fraud, or the damage—no action can lie. Now I think it clear from the bill of exceptions, that there was no secret danger or defect: the defects, if any, were open to common observation; Coxe saw the chimney and furnace, and that the chimney, from the sinking on one side, did not stand perpendicularly; and this was all that Perry knew. If, then, all the defects which Perry knew were open to common observation, and he made no false statement in reference to them, he certainly could not be guilty of a fraud. In Keates v. Cadogan, 70 E. C. L. R. 591, the Court of Common Pleas held, that there was no implied duty on the owner of a house, which is in a ruinous condition, to inform a proposed tenant that it is unfit for habitation; and that no action will lie against him for an omission to do so, in the absence of a warranty or actual deceit. The ground on which the court went, was, that the condition of the house could have been ascertained by the tenant by inquiry, or observation, and that the landlord had no reason to presume that he would not make the proper inquiry.

2. The charge given, in my opinion, cannot be sustained, when tested by the principles sanctioned in the opinion; for, although secret peril to life not disclosed would be a fraud, yet, to give an action, it must appear that the damage resulted from that secret cause of danger. Suppose there had been a secret danger, known to Perry but not disclosed by him, and also a visible cause of danger, which was known to all and duly considered, and that the damage resulted from the latter; this damage certainly would not give a right of action.—Testing the charge by this view, it was well calculated to mislead the jury under the evidence. The injury, all will perhaps say, resulted from the leaning of the chimney against the roof; and it is shown that Coxe examined the furnace and chimney, and saw that the latter did lean. Now, although

the jury might have believed that this was the immediate cause of the injury, yet, under the charge given, they would have been compelled to find for the plaintiff, if they believed there was also a secret danger in the building not disclosed: the charge, therefore, is too broad, when applied to the evidence.

PER CURIAM.—We have carefully reviewed the grounds on which the opinion heretofore delivered in this case rests, and have attentively considered the authorities to which we have been referred by the counsel on the rehearing; but we are unable to perceive any good reason for changing our conclusions, as they are set forth in the opinion heretofore delivered by Mr. Justice GOLDTHWAITE. A further examination of the record, and of the law arising upon the points presented by it, has only tended to confirm us in the correctness of our former opinion.

Let the judgment be affirmed.

COTTEN *vs.* THOMPSON.

1. Where a part owner of a slave has possession, claiming only an undivided half interest, and acknowledging the title of the other part owner to the other half, his possession is not adverse, although "he refused to deliver the possession to any one until his portion should be allotted to him."
2. The discharge of a levy, on account of the plaintiff's failure to give a bond of indemnity when required by the sheriff, destroys the lien on the property, and thus gives effect, as against a subsequent levy, to a deed executed by the defendant while the execution was in the sheriff's hands, but before it was levied.
3. Where the claimant's bill of exceptions shows an erroneous affirmative charge against him, the objection cannot be raised, to prevent a reversal in his favor, that the bill of exceptions purports to set out all the evidence in the cause, and does not show that the claimant proved the consideration of his deed from the defendant, although it was executed after the rendition of plaintiff's judgment: that point cannot be raised in the appellate court, when no objection was made to the reading of the deed in the court below, and no charge asked in reference to the effect of this deficiency of proof upon the rights of the parties.

APPEAL from the Circuit Court of Talladega.
Tried before the Hon. NAT. COOK.

TRIAL OF THE RIGHT OF PROPERTY in a slave named Bill, between the appellee, as plaintiff in execution, and the appellant, as claimant. The plaintiff's execution was levied on the slave, with others, on the 12th December, 1848, as the property of Solomon Spence, the defendant in execution; and the claimant derived title under a deed of trust executed to him, as trustee, by said Spence, on the 16th July, 1846.

At the time of the levy of plaintiff's execution, the slave was in the possession of one Joseph N. Savery, who was introduced as a witness by plaintiff, and who testified, that the slave had been in his possession for several years prior to the said levy,—that he claimed to own an undivided half interest in the slave, and had always admitted that the other half interest was in said Spence, and that said Spence was really the owner of an undivided half interest at the time of the levy, and had been such owner for some years prior thereto. The plaintiff also proved the value of the slave, and then rested her case.

The claimant then offered in evidence, and read without objection, so far as the bill of exceptions discloses, the deed of trust under which he claimed, dated July 16, 1846, and the certificates of probate and registration thereon endorsed, showing that it was proved before the clerk of the County Court on the day of its date, was deposited in his office for registration on the same day, and was recorded on the 21st July, 1846; and then read in evidence the endorsements on a former execution issued on the judgment in favor of the plaintiff against Spence; one endorsement is by Josiah Terry, sheriff of Talladega, and is dated the 1st day of January, 1849 (?), which shows a levy on the slave in controversy, with others, and a release of the others for want of a bond of indemnity, and the claim of Cotten to the slave now in controversy; and the other is an endorsement of Messrs. White & Parsons, attorneys for the plaintiff, dated March 1st, 1847 (?), and is in these words: "The sheriff will return this execution without selling the property." The claimant also introduced evidence tending to show that the sheriff had called on plain-

tiff's attorney for a bond of indemnity, as stated in his return above mentioned, and such bond was not given; that Savery had told Spence, in the year 184–, that he knew where there were certain slaves belonging to one Francis Mitchell, and if Spence would get an execution against said Mitchell he would show the property, if he (Spence) would have it levied upon, buy it in himself, and give Savery one half of it,—to which Spence assented; that a judgment against Mitchell was accordingly bought by Spence, for about $300; that Savery showed the slaves that had been levied on in this case, and they were levied on and sold, at the instance of Spence, by the sheriff of Coosa county; Spence bought them in his own name, and all of them (except a boy named Henry) went into possession of Savery, and there remained until the — day of ——, 1848, when he (Savery) delivered them to the sheriff of Talladega county; while in his possession, Savery worked and employed the slaves, but constantly claimed only an undivided interest of one half, and admitted that Spence was the owner of the other half; but he refused to deliver the property to any person, until his portion should be allotted to him; Spence knew that this was the character of Savery's possession, from the time he received the slaves up to the time he delivered them up; they were once levied on in his hands by the sheriff (in 1845) on an execution against Spence, but he refused to surrender them; he was, however, willing that Spence's interest should be sold. The claimant here rested his case.

The plaintiff read, by way of rebutting evidence, all the executions which had been issued on her judgment against Spence, with the endorsements thereon. The first, dated April 1st, 1846, is endorsed levied on sundry slaves (who are named), among them the slave in controversy; and a further endorsement by the sheriff shows that he required indemnity from the plaintiff before he would sell, which was not given, and the slaves were released from the levy on the 18th September, 1846. The second execution, dated 20th (?) February, 1847, was levied on the same slaves on the 19th (?) February, 1847, and under the written directions of the attorneys for the plaintiff, was returned without selling the property levied on. The third *fi. fa.* is dated 15th June, 1847, and is returned

nulla bona. The fourth is dated 2d November, 1847, and is returned with a like endorsement. The fifth is the *fi. fa.* under which the claim in this case is made. The plaintiff then showed by proof, that Spence had recovered the slaves of Savery in an action of detinue, and that the latter delivered them to the sheriff in 1848, under the judgment in detinue in favor of Spence; that at and before the delivery aforesaid, the sheriff had in his hands the *fi. fa.* of the plaintiff, with a bond of indemnity as to the slave in controversy.

This being all the evidence, the court then charged the jury, among other things, as follows: 1st. That if, at the time the deed was made from Spence to Cotten, Savery held the slaves, claiming to be the owner of one half interest in the whole of them, and was unwilling to part with his possession until his interest was adjusted to his satisfaction, and that his claim and possession were known to Spence when he made the deed to them, then said deed was inoperative except as between Spence and Cotten; that if, after the making of the deed, Savery delivered up the slaves to the sheriff, in accordance with the judgment in detinue, then the deed of trust would become operative from that time, and would, so far as that is concerned, convey the property.

2d. That, if the plaintiff allowed the lien of her execution to become dormant, or destroyed, by refusing to indemnify the sheriff to sell the slave, or by ordering the sheriff to return her execution, with directions not to sell the property levied on,—still, if she had sued out another *fi. fa.* on said judgment, and had it in the hands of the sheriff on the 8th day of December, 1848, the time the slave was delivered to that officer under the judgment in detinue, and the plaintiff had before that time indemnified the sheriff to levy on and sell the slave, then the lien of the plaintiff's execution would be revived from the date of such indemnity.

These charges, which were severally excepted to, are here assigned for error.

RICE & MORGAN, for the appellant:

1. When the levy of an execution is discharged, in consequence of the refusal of the plaintiff to give a required bond of indemnity, its lien is suspended, and must yield to the title

of a *bona fide* purchaser or mortgagee from the defendant, acquired before a bond of indemnity is executed.—Otey v. Moore, 17 Ala. 280. A lien lost by such refusal of a plaintiff to give bond of indemnity, cannot be revived as against one who *bona fide* purchases, or takes a mortgage, before the bond of indemnity is given.

2. Each charge of the court is directly opposed to the decision of this court, when this case was here at a former term. Cotten v. Thompson, 21 Ala. 574. It is clear that, even if Savery and Spence had been joint owners, Spence had the right to mortgage the slave to Cotten, as he did do on the 16th July, 1846; and that if this mortgage was *bona fide*, (which was not even disputed,) it conveyed to the claimant all the right and interest of Spence in the slave. The fact that one tenant in common holds possession of a slave, claiming only an undivided half interest, and always admitting the other half interest to belong to his co-tenant, cannot deprive the co-tenant from making a valid mortgage or deed of trust of such slave. But here the appellee proved that Spence had actually recovered the slaves from Savery in detinue. This judgment in detinue, remaining unreversed, conclusively proves that Savery had no title, and that Spence had the entire title. Whether Spence had the entire title, or only a title to an undivided half of the slave, he had the right to make the mortgage to the claimant in July, 1846, and thereby parted with all his title, whatever it was. If half the slave belonged to Savery, and the other half belonged to the claimant under the mortgage of July, 1846, the slave was not subject to the execution.

The appellee contends, that the possession of Savery, as shown in evidence, was adverse to Spence, in July, 1846, and that therefore the mortgage of 16th July, 1846, to claimant, was void. The appellant denies that the possession of Savery was adverse to Spence; for Savery himself only claimed the half interest in the slave, and always admitted the other half interest to be in Spence. The possession of one tenant in common is the possession of both, especially when the one in possession always admits the right and title of his co-tenant to one undivided half of the property.

But, if the possession of Savery was adverse to Spence, still

the plaintiff in execution could not, for that cause only, avoid the mortgage made by Spence to the claimant. If Savery's possession was adverse, Savery might, perhaps, avoid the mortgage for that cause, if it were set up against him; but conceding that Savery (the adverse holder) could protect his possession by avoiding the mortgage because of his adverse possession, it is clear the plaintiff in execution cannot avail herself of any such objection to the mortgage on a trial of the right of property. The doctrine of adverse possession, however, has nothing to do with the case, as was in effect decided by this court when the case was here at the former term; for the facts then were, on this point, substantially the same as shown by the present record.

The rights of the claimant were disregarded in each charge given. It is clear that there was no lien on the slaves under the execution at the time the mortgage was executed by Spence to claimant; that Spence, by Savery's uniform admissions, and all the other evidence, owned at least one half of the slave at the time the mortgage was executed; and that the mortgage was not even pretended to be fraudulent. Yet, because Savery (who is no party to the execution) claimed to own the other half of the slave, and had possession so claiming, the court below ruled, in effect, that the slave was subject to the execution.

It is argued for the appellee, that the judgment should be affirmed, notwithstanding the error in the charges, merely because the record shows that the claimant's deed was executed subsequently to the rendition of the appellee's judgment, and does not show that its consideration was proved otherwise than by the recitals in it. This identical argument has been previously made in this court, and without success. The answer to it, found in several decisions of this court, is, that the point was not made in the court below, and cannot therefore be considered here.—Castillo & Keho v. Thompson, 9 Ala. 937; Eckford v. Wood, 5 *ib.* 136; Morrison v. Judge, 14 *ib.* 182; Brock v. Yongue, 4 *ib.* 584; Williams v. Cannon, 9 *ib.* 348; Spivey v. McGehee, 21 *ib.* 417; Nabors v. Camp, 14 *ib.* 460; Carlisle v. Hill, 16 *ib.* 398; Marshall v. Betner, 17 *ib.* 836.

WHITE & PARSONS, *contra;*

1. The record sets out all the evidence; and it also shows that the two charges excepted to were given by the court, "among others." The plaintiff in execution obtained her judgment on the 31st day of March, 1846; and the deed of trust under which the claim was made by Cotten, was not executed until the 16th day of July—three months and a half afterwards. The record shows that the claimant did not offer one particle of proof by way of sustaining the consideration of his deed, but he seems to have relied on the instrument itself, and its recitals, as sufficient for that purpose. In this, we insist, the decisions show he was wrong. This court decided, in Nolen & Thompson v. The Heirs of Gwyn, 16 Ala. 725, that "where a subsequent purchaser insists that, as against a prior grantee whose deed has not been recorded, he is a *bona fide* purchaser without notice, it is incumbent on him to prove the payment of a valuable consideration; the recitals in his deed are not evidence thereof." Where is the distinction, in point of principle, between the case at bar and this case? A judgment creditor certainly occupies as favorable a position as a purchaser under a deed. The reason is obvious. The judgment creditor has established his debt in the mode prescribed by law; and as a voluntary conveyance is void against creditors, it is necessary to prove the consideration of the deed, in order to relieve it from this imputation. Branch Bank at Decatur v. Kinsey, 5 Ala. 12; McCain v. Wood, 4 *ib.* 264; *Doe ex dem.* McGinty v. Reeves, 10 *ib.* 139; McCaskle v. Amarine, 13 *ib.* All these cases bear directly on this question; but the case in 10 Ala. 139, is very much like the present as to the point under consideration. In that case, the mortgagee claimed title against a purchaser under a judgment creditor of the mortgagor, and it was held that he must prove the consideration of the mortgage.

But it is said in the argument of counsel for the appellant, that the *bona fides* of this deed was not called in question in the court below. This position is not supported by the record. That shows all the evidence, and it is also stated therein, "this being all the evidence, the court charged the jury, among other things," &c. What "other things" did the court charge the jury? This court has repeatedly held, that it will

make all reasonable intendments in support of a judgment, not contradicted by the record; and "where it appears from the bill of exceptions that the plaintiff failed to make out his case, the appellate court will not, at his instance, reverse a judgment rendered against him because the court expressed to the jury an incorrect opinion upon the law, or gave an erroneous reason for a correct conclusion."—6 Ala. 631; 3 *ib.* 599. Again; this court say, "And whether the charge to the jury laid down the law correctly or not, it worked no injury to him (plaintiff), and the error, if any, does not authorize a reversal of the judgment."—Smith v. Houston, 8 Ala. 741. Many other cases to the same effect might be cited, but we will only refer to one more—the case of Scroggins v. Rowe, at the last term, deciding that where the record set out substantially all the proof, and a fact material to the plaintiff's right to recover was not proved, this court would not reverse, no matter what errors had intervened in the trial below. The fact not proved in that case was this; the suit was in the name of Scroggins as trustee for his wife under the "woman's law," and there was no evidence to show that he was in fact her husband; this court held it was fatal. We insist, the failure to prove any consideration to support this claim renders this deed fraudulent and void as against a prior judgment creditor, and that the court ought to have charged the jury, that if they believed all the evidence, they should find the property subject; and we further insist, this court is bound to declare, on this record and the facts therein set forth, that such is the law.

2. But we also think, there was no error in the charges given and excepted to—first, because a tenancy in common, in personal property of this description, does not and cannot, in the very nature of things, exist at law, or by operation of law. The parties may agree to be tenants in common of a slave, but the law never creates this estate in this species of property.—See Black. Com., tit. Tenancy in Common, vol. 2. There can be no unity of possession. We insist, further, that if Savery was not, in fact, a tenant in common, then he was a trespasser, setting up a title to one half of the negro, and under color of it keeping exclusive possession of the whole. This proposition seems to be self-evident. The record shows

he was, in fact, not a tenant in common, because he kept Spence out of the possession of any part of the slave; and that he did this without any real right, is shown by the recovery of the slave in an action of detinue by Spence. This establishes in the most conclusive manner another fact,—that Spence's right to this slave was a thing in action, to recover possession of which, he was forced to bring that suit; and thus it is made to appear beyond any dispute, by the record, that Savery's possession was adverse to Spence, at the time Spence made the deed under which Cotten claims, and so continued down to the time when the slave was recovered in detinue, and was, with the others, delivered to the sheriff of Talladega, as Spence's property. When they were delivered to the sheriff, the plaintiff had her execution in his hands, with instructions to levy, and had also indemnified him to do so; both the bond and the execution were in the sheriff's hands before the slave was delivered to him; the lien of the execution attached, therefore, before that of the deed. It is laid down in a note in Blackstone, that when one tenant in common has been in peaceable possession twenty years, it is a good defence to an action of ejectment, because his possession is adverse to the one who is out; but here there is no room for doubt—the record shows that Savery kept exclusive possession of all, under a claim to one half, and that Spence was forced to sue. Where was that "unity of possession" which is an indispensable requisite to a tenancy in common?

LIGON, J.—The questions to be settled here arise out of the two affirmative charges of the court, as no objection, in the court below, to the admission of evidence, was raised by either party.

1. The first charge given by the court is clearly erroneous. If the fullest effect is given to the proof relating to the possession of Savery, it is not adverse to Spence, except as to an interest of one half in the slave in controversy. If all that Savery claims is allowed him, he held the slaves both for himself and Spence, at no time questioning the title of the latter to an undivided one half interest in them. We know of no case which rules such a possession to be adverse: the holding is similar to the possession of tenants in common in real estate, and must be considered in reference to the rules which gov-

ern such tenancies. Under these rules, the case presented is that of one tenant in common in the actual possession and enjoyment of the entire premises, fully recognizing all the title of his co-tenant. In such case, the possession is not adverse, and never becomes so, unless, on demand of the tenant not having the actual possession, he who is in refuses to account with him for the rents and profits, and denies the title of his co-tenant.—2 Black. Com., top page 156, (note 28). Nothing of this kind is shown here; and we have no doubt that the deed to Cotten became operative, as a conveyance of Spence's interest in the slave, from the time of its delivery.

It is true, that, at the time of its execution, the appellee was a judgment creditor of Spence, with a *fi. fa.* on her judgment in the hands of the sheriff; but it is also shown that this *fi. fa.* had been levied on this slave, which was released by the sheriff, because he had doubts as to its being the property of Spence, and had demanded a bond of indemnity of the plaintiff, who failed to give it in the time prescribed by law. This had the effect of destroying the lien of the execution as to this property, up to the time of the levy, and thus gave effect to the deed of Cotten which was made before that period. Otey v. Moore, 17 Ala. 280.

This view is wholly inconsistent with both the charges given in the court below, and we therefore pronounce them erroneous.

It is insisted, however, that although this is conclusive of error in the charges, still, as the record does not show that the claimant proved any consideration for the making of the deed, it is evident the verdict is right, and that the charges amount to error without injury. It is a sufficient answer to this, to say that the record does not show that this point was ever made in the court below; and it is certain that it exerted no influence over the court in producing the erroneous charges given. Under these circumstances, we cannot consider it here, especially as no objection to the reading of the deed was made in the court below, and no charge was asked in reference to the effect of this deficiency of the proof upon the rights of the parties.—Castillo & Keho v. Thompson, 9 Ala. 937; 5 *ib.* 136; 14 *ib.* 182; 16 *ib.* 398; 21 *ib.* 417.

Let the judgment be reversed, and the cause remanded.

CHILTON, C. J., not sitting.

McCARTNEY *vs.* KING ET AL.

1. If the plaintiff in execution purchases at the sheriff's sale, after having indemnified the sheriff, and with notice of a defect in the title, he cannot come into equity, after paying a recovery had against him by the true owner, to be relieved of his purchase.

APPEAL from the Chancery Court of Talladega.

Heard before the Hon. E. D. TOWNES.

THE original bill in this case was filed by the appellant against Matilda M. King, Solomon Spence, David A. Calhoun and John Bradley, to enforce a vendor's lien for the unpaid purchase money of land. It alleged, that the land was sold, in 1836, by one Jesse Dunn to said Bradley, for about $5,000, and a conveyance in fee simple executed by the vendor; that Bradley gave his two promissory notes, for $1,000 each, to secure the payment of a part of the purchase money, which notes Dunn afterwards, for a valuable consideration, assigned to the complainant; that Bradley subsequently sold a part of the land to one William King, and took his two notes, for $1,000 each, for the payment of the purchase money; that Bradley afterwards assigned King's said notes to complainant, in exchange for the two notes which the latter held on him, and took up his own notes; that complainant obtained judgments at law on King's two notes, "but cannot find assets to satisfy them;" that King died in 1840, and Bradley afterwards conveyed the land to said Matilda King, who was the widow and executrix of said William King, and to her son John C. Calhoun, who was executor of said King; that said defendants Matilda and John C. took the conveyance with full knowledge that the land was not paid for; that said John C. Calhoun afterwards died, intestate, leaving his brother David A. Calhoun his only heir-at-law; that said Matilda was afterwards removed from the executorship of said King's estate, and the defendant Solomon Spence was appointed his sole administrator; that Spence was also appointed administrator of said John C. Calhoun's estate, and had reported both estates insolvent.

After Mrs. King had put in an answer to the bill, there seems to have been an order of reference to the master, to ascertain and report the amount due on complainant's said judgments; at least, the master's report, which is next copied in the record, purports to have been made in pursuance of an order of reference, but the order itself nowhere appears.—This report ascertains that one of the judgments had been satisfied in full, and there was a partial satisfaction entered on the other, leaving a balance due of $427. Several supplemental bills were afterwards filed, the object of which was to have these credits on the judgments set aside, and the complainant remitted to his lien on the land for their full amount. The facts presented by these several bills, which are sustained by the proof, may be thus briefly stated:

Executions were issued on complainant's judgments, against said Spence as the administrator of King, and were levied on several slaves. These slaves were claimed by Spence as administrator of said John C. Calhoun, and also by said David A. Calhoun; but the plaintiff indemnified the coroner to sell, and became the purchaser himself for the sum of $2,483, which constituted the said credits on the judgments. At the time of the sale, Spence gave public notice that he claimed the slaves as the property of his intestate John C. Calhoun, and said David A. Calhoun also gave notice that he claimed them as his own, and would assert his right to them. Subsequently, Spence, as administrator of said John C. Calhoun, brought an action at law against complainant for the said slaves, and recovered a judgment against him for their full value; and said David A. Calhoun filed his bill in chancery against complainant, and obtained a decree against him for about $2,800 for his interest in the said slaves. Complainant, having paid off this judgment and decree, now seeks to be relieved of his purchase, and to be remitted to his lien on the land for the full amount of his judgments.

The chancellor refused the relief prayed by the supplemental bills, holding that, as the complainant purchased at the coroner's sale with full knowledge of the defect in the title to the slaves, he could not be relieved of his purchase in equity; and his decree is now assigned for error.

MORGAN & MARTIN, for appellant:

1. There is an undisputed lien for the purchase money, to the extent of the sum due on the judgments described in favor of McCartney v. Spence, administrator of King. The question is, what sum is due? and this question is not to be determined alone by reference to the fact whether the judgments are satisfied, or even extinguished, in contemplation of law; for, if such is the case, and if in equity the debt will not be considered as extinguished, it will exist in its full force, and attended with its original incidents and liens.

2. There was no satisfaction of record of these judgments, so as to conclude a court of chancery from looking into the fact whether there was a satisfaction of the judgments.—Conceding to a sheriff's return full force, it is still only *prima facie* evidence, as to third persons, of the facts stated in it.—Gov., use &c., v. Gibson, 14 Ala.; Nolin v. Hamner, 22 Ala. 580; Gifford v. Woodgate, 11 East 297; Cator v. Stokes, 1 M. & S. 600; Phil. on Ev., vol. 5, p. 391; 8 B. Monroe 302.

3. There is no satisfaction of record in this case: there is a receipt on the record of the Circuit Court, purporting to be signed by the plaintiff in execution, for the damages on one of the judgments, and for a portion of the damages on another; but this receipt does not prove itself, and if it was proven to be genuine, it does not, by being put on the record, *ipso facto* create a satisfaction. A satisfaction of record, and possessing the qualities of record evidence, is something more than a mere receipt, or return of a sheriff: it must be a matter which passes *sub judice* to have the effect mentioned.

4. Conceding, for the sake of the argument, that a court of law could not be controlled by a court of equity, so far as to authorize the latter to set aside entries made on the records of the former; still, cannot a court of equity examine into the effect of a receipt, on a judgment at law, and allow it to be explained, as it could any private receipt, and declare the debt to exist in the form of an equitable right or demand, although it could not be again restored to vitality and force as a judgment at law? and if declared to exist in this form, to proceed, and enforce the liens attendant upon it?—McGehee v. Ellis & Browning, 4 Litt. 244. And it makes no differ-

ence that the purchaser of the property had notice of the defect in the title.—McLaughlin's Administrator v. Daniel, 8 Dana 182.

5. Equity has jurisdiction to decree the re-payment of money to one who has paid it, in good faith, under a mistake, or for the benefit of a person whose duty it was to pay it, on the principle of substitution, and will place the person paying the money in the place of the creditor who received it, and enforce the obligation of the debtor to pay the debt in favor of such person.—McGehee v. Ellis, 4 Litt. 244. And a court of equity, where the demand is of an equitable nature, will enforce it, in favor of a person who by his act has extinguished a debt against another, if the latter by any act adopts or ratifies the payment.—See Poe, sheriff, v. Dorrah, 20 Ala. 291 ; Bray v. Howard, 7 B. Mon. 467. In this case, King's administrator adopts the payment endorsed on the execution by McCartney, and insists that it is a discharge ; so that, if King's administrator did not, in fact, pay the debt, the person who did pay it, is entitled to recourse against him. And if the plaintiff, by mistake, or upon an insufficient consideration, entered a discharge upon the debt, when the defendant was not entitled to it, the debt still remains.—Pearson & Fantt v. Thomason, 15 Ala. 700.

6. In this case, the executor of King, who preceded Spence in the administration, had returned under oath to the Orphans' Court that the slaves levied on by the sheriff were the property of King's estate, and had also made a fraudulent purchase of them, at his own sale as King's property, and returned his purchase to the Orphans' Court. Spence took no steps to correct the action of his predecessor, and left all of King's creditors under the false impression that the property was still belonging to the estate, if Calhoun's purchase was invalid, of which there could be but little doubt. At the sale of the property, Spence made no claim to the property, as belonging to Calhoun's estate, of which he was also the administrator, but suffered it to be sold without objection. His conduct was calculated to mislead the purchaser at that sale, and he is estopped, in equity, from claiming either the property or its proceeds.—Stone v. Britton, 22 Ala. 543 ; 19 Ala. Rep. 430.

7. Spence, as administrator of John C. Calhoun, made an election, after the sheriff's sale, to consider the slaves as the property of the estate of Calhoun, instead of King; and on this election, he predicated an action at law, which resulted in the recovery of the whole value of the negroes by him.—This election was in direct opposition to what a court of equity would have required him to have done, at the instance of any person interested in the estate; and by this means, he took the value of the negroes out of the hands of McCartney, who was the indemnitor of the coroner, McLane. Can Spence, in equity, claim the credit on the judgment, and the value of the slaves?—See McLane v. Spence, 11 Ala. 172; Same v. Same, 6 Ala. 898. Spence can claim neither the credit on the execution, nor the value of the slaves; because the slaves never belonged to him as administrator of King or Calhoun.

8. The maxim *caveat emptor* is, in effect, that the sale was made under such circumstances that there is no warranty.—The purchaser takes the risk of defects of title, so far as the vendor is concerned. It operates as an estoppel upon the purchaser, to attempt to avoid the contract of purchase for defects of title; but, like all other estoppels, there must be mutuality, and while the vendee is estopped to set up a defect of title at the time of sale, the vendor is also estopped from denying the validity of the sale. He simply says, "I am not bound to defend the title as against third persons." He cannot say so as to a title he held at the time of the sale, and afterwards attempts to enforce: he is bound not to set up such a title.

9. This maxim only applies as between the parties to the contract, and to those in privity with them. A defendant in execution is not a vendor nor vendee of property sold under execution against him. He is passive: he has done and suffered nothing, which could create an estoppel for or against him.

10. A person acting fraudulently cannot shield himself behind this or any other maxim of the law.

11. The maxim "*caveat emptor*" does not apply to sales on a warranty. This is a sale on a warranty: where the sheriff is indemnified to make a sale, he is a warrantor of the title (Hodge v. Thompson, 9 Ala. 131); and the indemnitor stands

in the shoes of the sheriff. If a stranger purchases at such a sale, he must have a good title. If the plaintiff in execution should purchase, why must he not have a good title? He was compelled to indemnify the coroner to make the sale, or let it pass entirely. The law imposes no penalty on him for this act, but makes it a duty on the part of a plaintiff to save the officer from trouble; and it is always the defendant's fault that a plaintiff is forced to such measures: if he would pay his debt, or even make a fair disclosure of his property, indemnities would not be needed; and so it was in this case. What disadvantage, or loss, or contract, or understanding is it, to which a defendant in execution is a party, and which would enable him to say to the purchaser, whether plaintiff or a stranger, "You bought with notice," or "There was no warranty in this case?" No one ever supposed that he would warrant the property.

12. The very fact that there was a warranty at this sale is the reason why a court of equity will interfere at the instance of the plaintiff in execution, or even a stranger, and give relief as against the defendant in execution.—McGehee v. Ellis, 4 Litt. 244; Jones v. Henry, 3 *ib.* 427.

13. The effect of the declaration of insolvency of the two estates of King and Calhoun, is not to give Spence, as the administrator, any rights superior to such as he would have in the absence of such a declaration. It is not shown that there are any creditors of either estate besides McCartney. This is not a question between creditors, but between a creditor and the administrator or heirs of the estate. McCartney is the creditor, and the defendants claim the estate. Such a declaration is by no means conclusive as to the insolvency of the estate.—McGuire v. Shelby, 20 Ala. 456.

14. It is the policy of the law to uphold and sanction judicial sales, and to give purchasers confidence in them. If such sales are to be mere traps for the unwary, they will become a curse to the parties interested in them. A sheriff, who fails to disclose at the sale a known defect of title, is liable, even to the plaintiff in execution, if he is a purchaser, for the whole value of his bid.—Bank U. S. v. Carroll, 4 B. Monroe 49; Commonwealth v. Dickinson, 5 *ib.* 508.

WHITE & PARSONS, *contra:*

There is no ground stated in the bill for the jurisdiction of this court: the remedy, if any, is to be had by application to the court whence the execution issued, to set aside the sales, and this remedy must be sought promptly.—Lamkin v. Crawford, 8 Ala. 159; Nolin v. Hamner, 22 *ib.* 581; 22 *ib.* 365; McGehee v. Ellis & Browning, 4 Litt. 247; Banks v. Spain, Litt. S. C. 451.

Complainant shows by his bill, that he was cognizant of all the facts, and after knowing the facts he forced a sale by indemnifying the coroner to sell. If there was a mistake, it was a mistake of law, and will not avail him. If a man has knowledge of the facts, and acts presumptuously upon his knowledge of the law, though mistakenly, if not drawn into the mistake fraudulently, that is no ground for relief in equity. Friedly v. Sheetz, 9 S. & R. 161; Bank of United States v. Daniel, 12 Peters 32, 55-6; Hunt v. Rousmaniere, 1 *ib.* 15; 1 Story's Eq., §§ 113, 116-20; Haden v. Ware, 15 Ala. 149.

Here there was no fraud, no imposition, no undue influence, or surprise; but a deliberate, settled, wilful determination to take the risk of his own conduct by complainant. It is, to say the least, a naked mistake of law, without admixture of any of the circumstances which justify the interposition of a court of equity.—See 1 Story's Eq., § 110; and for exceptions to the rule, see § 120, *et seq.*

This is not the ordinary case of a party resisting the payment of purchase money bid by him at sheriff's sales, upon the ground that he has been deceived, or that he acquired no title, and that there was no consideration; but complainant satisfies the execution, receives the property and retains it, and yet asks that the price which has been paid for it shall be paid back, because the officer who sold it has been found liable for it in one action, and that it has been charged with the value of D. A. Calhoun's interest in it, of both of which he had distinct and emphatic notice.

The sale was upon sufficient consideration; the uncertainty as to the right would enable the complainant to buy it in very low, and the transfer of the possession was enough to sustain the promise, and the more so to prevent a rescission of the contract after it had been executed. Adequacy of consideration

will not be inquired into in the absence of fraud.—Parsons on Cont. 361-2; Livingston v. Byrne, 11 John. 566 mar.; Perry v. Williams, 4 Dudley 44.

In all of the cases in which relief has been granted in this court, similar to the case made by complainant, it will be found that there was fraud or some act of the defendant in execution misleading or deceiving the purchaser, or that cases in which there was no such element of decision are based upon those in which it did exist.—See Lansing v. Quackenbush, 5 Cow. 38; McLaughlin v. Daniel, 8 Dana 182; McGehee v. Ellis, 4 Litt. 244; 3 Blackf. 293; 3 Litt. 428.

If McCartney has any remedy, it is as a purchaser and against the defendant in execution, and not as an original creditor whose lien for the purchase money of the land is yet retained, or an execution creditor whose debt has not been satisfied; but his present demand is a new debt from defendant in execution to him, arising out of and based upon the fact of his having paid off and discharged the debt of defendant in execution by the purchase of property which did not belong to defendant, and for which he has had to account to a third person.—4 Litt. 244; 8 Dana 184. By the satisfaction of the executions the endorser was discharged, and he being discharged, the lien upon the land is gone.—Click v. Bass, 5 Ala. 363.

The sheriff's return of satisfaction is conclusive until set aside in the Circuit Court.—Clarke v. Gary, 11 Ala.; C. & H. Notes to Phil. Ev., vol. 4, pp. 798-9; 3 Litt. 129-30.

But it is insisted that the prevailing doctrine, and the correct one, is that the sheriff only sells the interest of the defendant in execution in the property sold by him under execution, and that all persons who buy at such sales buy at their own risk. "Let the purchaser beware," is the rule applicable to such sales.—Worthington v. McRoberts, 9 Ala. 297; Perkins v. Winter, 7 *ib.* 867; Thayer v. Sheriff, 2 Bay 170 (cited 7 Ala. 870); Friedly v. Scheetz, 9 S. & R. 156; The Monte Allegro, 9 Wheat. 616; 4 Gill & J. 491-2; 19 Ver. 325-6; 18 Verm. 390; 10 Miss. 157; 2 Yerg. 394; 9 Ala. 300; 11 Wheat. 307; 4 Am. Com. Law Jour. 137.

A purchaser cannot object to a sheriff's sale a defect of title of which he had notice.—Friedly v. Scheetz, 9 S. & R. 161.

When the plaintiff in execution indemnifies the sheriff in levying, and purchases the property without paying the money, at a sufficient sum to cover his debt, it operates as a satisfaction of the execution, though in fact the property did not belong to the defendant, and the plaintiff was forced again to pay for it upon his bond of indemnity.—4 Dudley 44; 2 Bailey 418; 5 Strob. 148; 4 Strob. Eq. 186; 9 Yerger 100.

When plaintiff in execution bids off property of defendant at sheriff's sale, the bid itself is payment.—Smith v. Godbold, 4 Strob. Eq. 186.

Equity follows the law, and will not set aside a plain and settled principle of law upon the mere hardship of the case.

Plaintiff in error cannot recover, either as purchaser or as plaintiff in execution, of the defendant in execution. There was nothing done by defendant in execution to induce him to buy; on the contrary, Spence, the defendant in execution, forbid the sale, and notified McCartney that the property did not belong to the estate of King. There is no privity of contract between McCartney as creditor, or as purchaser, and the defendant in execution, in the purchase of this property, and without this no indebtedness on the part of defendant in execution to complainant could originate.—Atkinson v. Farmer, 2 Murph. (N. C.) Rep.; Abel v. Sutton, 1 Esp. 112; Williams v. Willington, 1 H. Bla. 82-3; Corbett v. Poilnetz & Wife, Durn. & East, 1 Term R. 17 to 21 mar.

Moral obligation not sufficient to sustain an action, either at law or in equity.—Parsons on Cont. 358, 361.

GOLDTHWAITE, J.—The object of the bill is to enforce the vendor's lien for the purchase money of land. The land was sold by John Bradley to William King, and part of the notes given for the purchase money assigned to the appellant, who, before filing his bill, obtained judgments at law upon them. From the pleading and evidence in the cause it appears, that the appellant sued out executions against Spence, as the administrator of the vendee, King, and had them levied on a number of slaves as the property of King's estate. At the time the negroes were sold upon this levy by the coroner, Spence, who was the sheriff and administrator of Jno. C. Calhoun, as well as of King, gave notice that the title was in

Calhoun, and that he would sue for them as his representative. David A. Calhoun, also, at the same time claimed the slaves, and gave notice that he would assert his claim to them. The coroner, who was indemnified by the appellant, proceeded to sell, and they were bid off by the latter, who heard the notice given by Spence and Calhoun. The amount bid by the appellant being more than sufficient to pay one of the executions, he acknowledged satisfaction on the one, and entered a partial satisfaction as to the other. Spence then brought an action against him, and, as the representative of John C. Calhoun, recovered of him the value of the slaves, which he paid; and David A. Calhoun, by a suit in chancery, compelled him to pay about $2,800, which was declared to be a lien in his favor on the slaves. The master reported an account, in which he has credited King's estate with the whole amount bid for the slaves by the appellant, and reported the balance due. These facts are charged in a supplemental bill, and it is asked, that the satisfaction on the one execution and the partial satisfaction on the other be set aside, and that the appellant be allowed to enforce his lien for the whole amount of his notes upon the land. This prayer is predicated upon the entire failure of the title of the slaves bought by him, as evidenced by the recoveries of Spence and David A. Calhoun.

Upon these facts, the main inquiry is, whether a plaintiff, who has bought property under execution sale, after indemnifying the sheriff, and with notice of the defect of title, can come into chancery, after the payment of a recovery against him by the true owner, and be relieved of his purchase.

The question as to the application of the doctrine of *caveat emptor* to sales made by the sheriff under execution, can scarcely be regarded as an open one in this court, since our decisions applying the rule to sales made by an administrator under the order of the Orphans' Court.—Perkins v. Winter, 7 Ala. 867; Worthington v. McRoberts, 9 *ib.* 297. There can be no difference, in principle, between such sales and one made by the sheriff in pursuance of the law, under execution. Both are judicial sales; and if the doctrine obtains in the one case, the same reasons would require its application in the other. Indeed, in Lampkin v. Crawford, 8 Ala. 153, where the suit was brought by the marshal against a purchaser to

recover the amount bid by the latter upon the sale of property under execution, we held, that the fact that the defendant in execution had no title to the property was no defence to the purchaser.

We do not, however, understand that the application of the rule to the general class of cases to which have referred is denied; but it is insisted that it does not hold in cases where the sheriff is indemnified before making the sale. It may be true, that, in such a case, the sheriff becomes, in effect, the warrantor of the title, and his vendee may be entitled to the protection which the officer himself would have. But in the present case, the purchaser is the indemnitor; and if it be conceded that, if a stranger had bought the property, he might invoke the protection of the bond of indemnity, that is very different from holding that the indemnitor—the party who directs the trespass to be committed—may indemnify himself for the consequence of his act, by a resort to the defendant in execution. If that was allowed, we should be working in a circle: the purchaser would be compelled to pay the amount of his bid, but he could recover the amount, if his title failed, by a resort to the bond of indemnity; and the obligor in the bond could, in his turn, recover the amount of the defendant in execution, and thus the parties would be left precisely where they started.

The true doctrine, we think, is this: the purchaser, where the sheriff is not indemnified, buys at his own risk, and if it should turn out that the defendant in execution has no title to the property, he is notwithstanding liable for the amount of his bid. This is on the ground of contract. The officer sells, and the purchaser buys (not the thing itself, but) the real or supposed right which the defendant in execution has to it; and the purchase operates precisely the same as if he had bargained for and obtained a quit-claim. If the purchaser pays the money, the officer is bound to apply it to the discharge of the execution, for the reason that, as we have said, he receives it for a supposed right which the defendant in execution has to the thing sold. The same principle which compels the purchaser to pay in such a case binds the officer to apply the amount paid to the execution. If the sheriff is indemnified, we cannot see that the character of the sale is changed as to

the defendant in execution: he is in no way connected with the bond of indemnity; and yet we are called upon to make that act produce a different result as to him. If one was voluntarily to pay an execution against another, no recovery could be had against the debtor, without a ratification of the payment by him; for the law does not allow a person to raise a debt against another without his consent; and still less could a party who stipulated simply for a quit-claim title call upon the vendor as a warrantor. Even if a payment voluntarily made by a third person was ratified by the debtor, the original debt would be extinguished, and the person making the payment stand as a creditor at large against the debtor. He might, in such case, be entitled to sue and recover of him the money, but he could call for nothing by substitution.—Roundtree v. Weaver, 8 Ala. 314.

From what we have said, it follows, that the amount of the bid made by the appellant for the slaves sold was properly credited by him on his executions, and that neither the failure of the title, nor the action of the defendant in execution in insisting on the satisfaction, would authorize a court of chancery to set it aside.

It is urged, however, on the part of the appellant, that the peculiar situation of the parties to each other is shown by the record to be such as to require the satisfaction to be set aside, and the lien enforced for the whole amount of the purchase money. In other words, that the record discloses that Spence was the administrator of John C. Calhoun, and also the administrator *de bonis non* of King; that the former had, while he was the representative of King, purchased the slaves at his own sale, under such circumstances as to authorize a court of chancery to set it aside; that Spence, representing both estates, had the power to elect whether he would confirm the voidable purchase made by Calhoun, thus rendering the title good in himself as the representative of that estate, or disaffirm it, and treat it as the property of King's estate; and it is insisted, that in such a case a court of equity will control the election, so as to do justice to the creditors of each estate. The difficulty which meets the appellant in this aspect of the case, is, that whether the slaves be regarded as the property of the estate of either Calhoun or King is entirely immaterial,

so far as satisfaction to the amount of his bid is concerned. If the purchaser is to take the risk, and is bound to pay the money, although the property sold does not belong to the defendant in execution, then, if the creditor becomes the purchaser, his debt is reduced by the amount of his bid, and *pro tanto* he is no longer a creditor, and cannot as such claim the assistance of the court. If a stranger had bought the slaves, we have seen that he could not resist the payment of the purchase money; and that the plaintiff in execution was the purchaser cannot affect the principle, as he would be entitled to no peculiar rights on that account. There may have been circumstances in the conduct of the representative of King, which induced the appellant to believe that the slaves were the property of that estate; but these circumstances, as was held by this court in McLane v. Spence, 11 Ala. 172, were far from being conclusive. If, indeed, Spence, being the representative of the estate of Calhoun, had stood by in silence, and permitted the slaves to be sold under an execution against himself as the administrator of King, that, in our opinion, would have been an election on his part to treat the property as belonging to that estate; but this is not the case: Spence is found at the sale asserting the title of Calhoun,—electing to treat the property as belonging to that estate, and giving notice to the appellant, before he made the purchase, that he would so consider it; and if, after receiving this warning, he chose to buy, he is a purchaser with notice, and must abide the consequences against which he was warned. We know of no principle, under such circumstances, upon which he would be entitled to relief.

Decree affirmed, with costs of this court against the appellant.

DILL ET AL. *vs.* SHAHAN.

1. Although a court of equity may, in certain cases, relieve against a mistake of law, yet the mistake must be gross and palpable, and such as would warrant the belief that an undue advantage was taken of the complainant, owing either to his imbecility of mind, or to the exercise of some improper influence over him either by the party with whom he dealt, or by some other person with the knowledge, consent, or procurement of that party.
2. If an executor purchase lands belonging to his testator's estate, at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, he cannot be relieved of his purchase in equity.
3. A cross bill cannot be sustained when the original bill is without equity, nor when it is inconsistent with the answer.

APPEAL from the Chancery Court of St. Clair.

Heard before the Hon. E. D. TOWNES.

THE original bill in this case was filed by Joel Chandler to obtain a rescission of a contract for the purchase of certain lands belonging to his father's estate, which he had bought at a public sale made by himself and his co-executors, under the belief that the will of his father conferred authority on them to sell the real estate. The bill alleges, that complainant and his co-executors had propounded his father's will for probate, and that it had been established as valid by the verdict of a jury; that he and his co-executors then qualified, gave bond, and took upon themselves the execution of the will; that "under the supposition that said will authorized a valid sale to be made of the real estate," they exposed the lands to public sale; that complainant, "not doubting the full authority of said executors to sell under said will, and the power of any one of them to convey title, purchased said lands at said sale, and they were knocked off to him at the price of $4000; and thereupon the said James Hampton (one of the executors) executed to him a deed for the same as executor of said estate"; that complainant gave his three promissory notes for the purchase money, with John Shahan (who is made a defendant to the bill) as surety, and also executed a deed of trust on the land to secure their payment; that a judgment

has been obtained against Shahan on one of said notes, on which he has been compelled to pay $1830; that said executors have been removed, and the sheriff of the county appointed administrator *de bonis non* of said estate; that a decree has been rendered against said executors for the amount of said notes; that complainant, as soon as he discovered the utter want of authority in the executors, under said will, to make said sale, tendered a rescission of said contract to said administrator, and offered to deliver up to him and to cancel said deed from James Hampton, and even to reconvey by deed whatever interest might have vested in him under said sale, all which propositions were refused. The heirs-at-law and administrator of the decedent, the executors who made the sale, and said Shahan, are made defendants to the bill; and the prayer is, for a rescission of the contract, the cancellation of said notes and deed of trust, and for general relief.

The original bill was filed in March, 1846; and at the ensuing August term, the following interlocutory decree was rendered: "In this case the complainant asks leave to dismiss his bill; and it appearing to the satisfaction of the court that the bill was filed for the benefit of John Shahan, the surety of the complainant, and that the application is made in fraud of his rights, and by collusion with another person; and the said Shahan here offering to indemnify said complainant against all costs which may accrue in the case,—it is ordered that said leave be refused, and that said Shahan forthwith file with the register of this court a good and sufficient bond, payable to said Chandler, in a sum sufficient to cover all costs," &c.

On the 5th March, 1847, Shahan filed his answer to the original bill, and also a cross bill. His answer avers, "that defendant, who was made such for matter of form, and whose interest said bill prays may be regarded, so far as that he may be refunded the amount of money he has been compelled to pay by execution, as stated in said bill, and that the collection of the same be perpetually enjoined,—comes and accepts the provisions of said bill tendered in his behalf, and, answering the same, says that the charges, statements, and allegations therein contained, are true, and this defendant avers his readiness to pay the expense of said suit; and now, having fully

answered, he prays that he may be permitted to file a cross bill, so as to obtain the relief prayed in his behalf, and such other and further relief as in said cross bill is prayed." The cross bill avers, that, since the filing of the original bill, the land has been sold by the sheriff as the property of the original complainant, and purchased at the sale by one John F. Dill, who had notice of the pendency of this suit and of all the facts relating thereto, and who discouraged the bystanders from bidding at the sale by representing the title to be worthless; that Dill afterwards obtained from the original complainant an assignment of his interest in his father's estate, without any consideration, and for the purpose of defrauding Shahan; that said complainant is utterly insolvent, and is attempting, by collusion with said Dill, and in fraud of Shahan's rights, to dismiss his original bill in this case, and to make no further effort to set aside said purchase, thus throwing the whole burthen of it on said Shahan. The prayer of the cross bill is, that the purchase by said Dill from Chandler be vacated and set aside, and the latter's interest in his father's estate be applied to Shahan's reimbursement for the amount already paid out by him as Chandler's surety; that Shahan, unless the relief prayed by the original bill should be granted, be subrogated to the rights of the executors under the trust deed, as to the sum already paid by him as such surety, and that the said trust deed be closed for the purpose of reimbursing him, as well as protecting him against the other notes.

The chancellor held, that the complainant in the original bill was not entitled to any relief, as the doctrine "*caveat emptor*" applied to his purchase; but he retained Shahan's cross bill, and ordered a sale of the lands under the trust deed to pay the second and third notes yet unpaid, and directed the surplus, if any, to be paid to said Shahan to refund the amount which he had been compelled to pay on the first note. From this decree the defendants appeal, and here assign for error, 1st, that the court erred in decreeing a sale of the land embraced in the deed of trust; 2d, in not dismissing the original bill; 3d, in not dismissing the cross bill.

S. F. Rice, for the appellants:

1. The complainant in the original bill cannot rescind the

contract of purchase of the land, because he had full knowledge of all the facts and of the condition of the title,—because he accepted the deed of conveyance and went into possession,—because the heirs do not even question his title, but are willing to acquiesce in it,—because the maxim "*caveat emptor*" applies to him in its utmost rigor.—4 Ala. 29, 622; Haden v. Ware, 15 *ib.* 149; Reese v. Lamkin, 7 *ib.* 170; Reavis' Dig. 302, §§ 964 to 1000; Worthington v. McRoberts, 9 Ala. 300; Winter v. Perkins, 7 *ib.*; Jennings v. Jenkins, 9 *ib.*; Steele v. Kinkle, 3 *ib.* 352; Beck v. Simmons, 7 *ib.* 71.

2. The complainant in the cross bill cannot have any relief as to the rescission of the contract, because there can be no rescission; nor can he have relief by subrogation, because he has not paid the debt, but only one third of it. The right of subrogation cannot accrue to a surety, from his mere liability to pay, but from actual payment of the entire debt. Until the whole debt is paid, the surety can do no more than file a bill to compel the creditor to sue (which is not the relief sought in this case).—Whitaker v. De Graffenreid, 6 Ala. 303; Abercrombie v. Knox, 3 *ib.*; 4 Equity Dig. (Bar. & Har.) 654, § 7; Bogert v. Perry, 17 Johns. 352. The cross bill must be confined to matters in issue in the original bill, and must be consistent with the answer.—1 Hopk. Ch. 48; 8 Cowen 361; Story's Eq. Pl., § 401.

3. The assumption of the solicitors of complainant, that the other two thirds of the debt for the land, have been extinguished, is overturned by the bill and cross bill. There is no such pretence, or averment in either bill, and the complainants cannot raise a question in argument, which is not put in issue by the bill. The bills treat the entire debt ($4000 06¼) for the land as a valid debt, and assert a payment or extinguishment of one third of it only. A complainant is estopped from disputing anything admitted by his bill. The three notes are not the debt, but are only evidence of the debt. If the notes were burned up, the debt would not thereby be extinguished.—Foreman v. Hardwick, 10 Ala. 316. And although "a security, (to-wit, a note) given by one executor, in which he with his co-executors is a promisee, cannot be enforced even against his surety, when he is one of the plaintiffs," (as decided in Chandler's Ex'r v. Shahan, 7 Ala. 251)—

yet it by no means follows that the debt itself is extinguished or paid; but on the contrary, that decision rests upon the solid ground, that although the debt remains unextinguished, the debtor executor is not chargeable to his co-executors, but "to those entitled under the will, or in course of distribution," and that a court of law ought not to enforce the collection of the note in such case, because even "a payment by him to his co-executors would not discharge him from liability to account" to the legatees or distributees.—7 Ala. 254-55. It is entirely clear, that the principle thus decided in 7 Ala. 251, has no sort of application, except in cases where an attempt is made by co-executors to extort from the debtor executor a payment, which payment, even if made to them, would leave the debtor executor and his surety liable for the same debt to legatees or distributees. The principle is a mere shield against two payments of the same debt. Here the complainant does not use it as a shield, but as a sword. He does not ask less than to be allowed to use it so as to cut up and destroy the right of the legatees and heirs to the deed of trust made to protect the estate, to which two thirds of the debt is still due. The deed of trust was executed to secure the whole debt of $4000 06¼. The debt belongs to the estate of Joel Chandler, deceased, and so does the deed of trust. The heirs and legatees have the right to call on Barker, the trustee, to sell, to enforce the collection of the remaining two thirds of the debt. This is the right of the real creditors.

4. Upon the case, as made by the cross bill, there can be no subrogation. Shahan is a mere simple contract creditor of his principal, and is attempting to collect this simple contract debt in chancery. This is intolerable.—Sanders v. Watson, 14 Ala. 198.

5. The existence of the deed of trust cannot aid him, nor confer jurisdiction on a court of chancery.—Roland v. Logan, 11 Ala.; Chambers v. Maulden, 4 *ib.* 477; Colburn v. Broughton, 9 *ib.*

In every case cited by complainant's solicitors, payment of the entire debt is recognized as essential to create the right of subrogation. Lyon v. Bolling, 10 Ala. 463, is as strong as any case in the books; yet in that case, it is stated as clear law, that the surety, "upon the payment of the money due,"

may stand in the place of the mortgagee and "compel him to assign the same" (mortgage).—10 Ala. 467. The right of subrogation never exists in favor of a surety until the whole debt is paid. Before the debt is wholly paid, the law protects the surety by another principle, to-wit, "If the creditor parts with any fund which he could apply to the debt, the surety becomes exonerated *pro tanto*."—1 Ala. 29. It is absurd to pretend that a surety for a debt secured by mortgage, acquires the rights of the mortgagee, by merely paying one third of the debt.

The argument of complainant's solicitors starts with the error that there were "three debts provided for in the deed of trust." It mistakes the three notes for the one debt of $4000 06¼ for the land. The notes are not the debt, but only evidence of it.—10 Ala. 316.

The argument also disregards the doctrine of subrogation, by allowing to a surety all the rights of the mortgagee, before the debt is paid.—4 Equity Dig. 651, § 11.

JOHN T. MORGAN, *contra:*

1. A cross bill need not be confined to the issues presented in the original bill: if the rights are equitable, and grow out of the transactions on which the original bill is founded, it is sufficient; and it may be entertained to establish or perfect a claim which the original bill sought to set aside.—Nelson & Hatch v. Dunn, 15 Ala. 501; Wickliffe v. Clay, 1 Dana 589. The equity of the cross bill, in this case, is not at all dependent on the equity of the original bill, since, although it relates to the same subject-matter, it asserts independent grounds of equitable relief in favor of Shahan.

2. The debt created by the purchase of lands, by Joel Chandler, at his own sale as executor, if valid at all, became assets in his hands as an executor, as soon as the money was due, whether it was in fact paid or not.—King v. Shackleford, 6 Ala. 423; 13 *ib.* 435. No action, either at law or in equity, would lie in favor of any person, to collect the debt from Chandler; because it was assets of the estate, and as such, due to himself only, or to the estate; he could be made to account for it as executor, and in no other character. And it is for this reason, that the co-executors of Chandler cannot

treat this debt as a debt due to them from Chandler, but a debt due to the estate, which he has received; and as to them, is assets in his hands. If it is a debt due to them as executors, why can't they recover it? The debt is paid the moment it is due.

3. But it may be said, that Shahan, the surety on the notes, can't take this view of it; that his debt is not paid, however Chandler's may be. I answer, that Shahan is a surety, and whatever discharges the principal, discharges the surety. It is not a payment alone which can discharge a surety. Whenever the right of action upon the instrument, by which the surety is bound, is gone, then the surety is discharged. There is no law to throw a surety off of the express terms of his contract, and to create an implied obligation against him to pay, outside of the express terms of the contract.—McKay v. Dodge, 5 Ala. 388.

4. The notes given for the purchase money of the land became *functus officio* by the payment which Joel Chandler, as executor, made of them. It cannot be proceeded upon, and therefore has no office to perform.—Foster v. The Athenæum, 3 Ala. 302.

5. Really the sale by the executors was void, for want of power in them to make a sale. It is as if no sale had ever been made. The money arising from such a sale cannot be assets.—Price v. Simmons. Joel Chandler and Shahan were both heirs-at-law of Joel Chandler. If the sale was void, it did not divest their title as heirs, and did not entitle them, as heirs, to share in the proceeds of the sale. No legal consequences flowed from the sale. It is not like the case of Perkins v. Winter, and other cases cited by the appellant, but more like the case of Hurst & Shipp v. Weathers, 15 Ala. 417. The sale was a nullity, and therefore the maxim "*caveat emptor*," cannot apply. The objection is not that the title was bad, but that, whether good or bad, it was not sold; there was no sale, but a mere pretence.

6. The sale cannot operate as an estoppel, because it is averred and admitted, that the sale was made in ignorance of the legal rights of the parties; and for the other reason, that the executors did not sustain any injury by the act. They could not be made liable for the proceeds of the sale, as assets.

7. If the rescission of the contract was urged on the ground of fraud or failure of title, then the acquiescence of Joel Chandler, and his delay to file the bill for so long a time, would be conclusive on him; but it must be remembered, that while he took the possession of the land, under the executors, he had the superior right to it, as heir; and there is no possibility that the executors could be prejudiced by the delay, or that they could ever perfect the title to the land. The rule does not apply in such a case.

8. But Shahan's right to file this cross bill, in his character of surety for Joel Chandler, can be safely rested on other grounds—1st, any surety, whether he has paid the debt or not, can go into equity and compel his principal to pay the debt.—Comyn's Dig., vol. 8, p. 884; Tankersly v. Anderson, 4 Dess. 44; 10 Paige 595; 1 Sandf. Ch. R. 212; 1 Story's Eq. § 327; 2 *ib.* §§ 730, 840; Moore v. Beardsley, 8 Wend. 194; Eddy v. Tarver, 1 Penn. 581. And this being a clear ground of equitable jurisdiction, the court can go on and give full relief, and wipe out all frauds and fraudulent conveyances which intervene to prevent justice.—13 Vesey 133; 10 Johns. 587; 17 *ib.* 384. In Marsh v. Pike, 10 Paige 595, cited *supra*, the surety, who had not paid the debt, was permitted to file his bill to compel the creditor to foreclose the mortgage given for the security of the debt.

9. A surety stands upon higher grounds than a simple contract creditor, against the principal, especially where that relation still subsists; this is on the principle that a court of equity will interfere to prevent an injury, when it would not give redress for the wrong. If the surety has paid the debt, he becomes the simple contract creditor of his principal, and he can only claim relief then on the principle of substitution; and in this respect, his rights are very clear. If he has not paid the debt, he can compel the principal to pay it, in equity, and thus to save him harmless. This right is equally as clear as the other.

10. The cross bill presents both of these rights distinctly.

LIGON, J.—The original bill of Joel Chandler, set out in this record, is without equity. It seeks a rescission of his contract for the purchase of a tract of land belonging to the

estate of his father, of which Sarah Chandler, James Hampton, and the complainant, were the executors, so that the complainant was both vendor and vendee. It is not pretended, that the complainant was ignorant of any fact connected with the title to the premises, or connected with the power and authority of the vendors to sell and convey them: he relies solely upon his ignorance of the law arising upon the facts, (which were well known to him at the time he made the purchase,) for relief against his purchase.

It is true that courts of equity can relieve against mistakes of law, in certain cases; but, we apprehend, that the mistake of law against which such relief will be granted, must be gross and palpable, and such as would warrant the belief that undue advantage was taken of the party, owing either to his imbecility of mind, or the exercise of some improper influence exerted over him by the party with whom he deals, or some other person with his knowledge, consent, or procurement: when the evidence establishes this, and the bill sufficiently charges it, a court of equity will interfere for his protection.--1 Story's Eq., §§ 138, 140; Bingham v. Bingham, 1 Vesey 126; Lansdown v. Lansdown, Moseley 364; 2 Sch. & Lef. 101; 2 Ball & Beat. 171; Haden v. Ware, 15 Ala. 149.

But this case is not one of that class. The parties here must have known all the facts in respect to the title; and as the complainant was both vendor and vendee, he cannot be allowed to stultify himself, or to say that he perpetrated a fraud on himself from which a court of equity should relieve him. In fact, he does not pretend that any undue influence was exerted over him, or any fraud practiced upon him in the transaction. He seems to have acted on his own unbiased judgment, and to have made a bad bargain. This is his misfortune, but does not entitle him to relief in equity. He is, under his purchase, at least entitled to the interest of Sarah Chandler and James Hampton in the lands; and, perhaps, may be entitled to that of the other heirs who were of full age at the time of the sale, and were present at it, and assented to what was done. It is certain, that Sarah Chandler and James Hampton can assert no claim to the premises inconsistent with their deed to the complainant, for they are estopped by that instrument. We are clearly of opinion that

there is no equity in the original bill, and that it should have been dismissed.

As the original bill is without equity, there seems to be nothing on which to found a cross bill. These latter bills are never allowed until an answer is filed to the original bill, and then it is required by the rules which allow them that the matters set up in them should be german to the matter of the original bill, and consistent with the answer of the defendant who files it.—3 Dan. Ch. Pr. & Pl. 1743-46; 3 Rand. 117. It would seem to be a solecism in terms, to speak of a cross bill when there is no original bill; and a paper, in the form of a bill in chancery, which contains no matter which would give that court jurisdiction, is not to be regarded as an original bill for any purpose, but in legal contemplation is a nullity; and any action taken upon it in the court in which it is exhibited, except to dismiss it, would be without authority and void.

Again; the paper treated as a cross bill in this case contains matter wholly repugnant to the answer of the defendant who files it. In his answer to the original bill, Shahan, the complainant in the cross bill, admits all the allegations, and concludes his answer "that the charges, statements, and allegations therein contained, are true, and this defendant avers his readiness to contribute to the expense of said suit." It will be borne in mind that the original bill seeks a rescission of a contract for the sale of land, and the cancellation of certain notes made by Joel Chandler and Shahan for the purchase money, as well as a deed of trust made by the former to secure the payment thereof; and all this, Shahan, in his answer, admits should be done. In his cross bill, he sets up the same trust deed as a valid security, and having paid a part of the purchase money, as surety for the complainant in the original bill, asks that the mortgage security be foreclosed for his benefit to the extent of the money so paid by him. Here is a palpable inconsistency, which is wholly disallowed by the rules governing cross bills. In Hudson v. Hudson, 3 Rand. 117, the reason for this rule is thus succinctly stated by Carr, J.: "Now it is settled law, laid down by Lord Hardwicke, and never, I believe, stirred since, that a party shall not question in his cross bill what he has admitted in his

answer; and upon the strongest reason, for the answer being upon oath, it could never be endured that in the same court, in the same proceeding, the same party should set up a claim in direct conflict with that oath."

This view of the case relieves us from passing upon many points raised in the argument, and elaborately and ably discussed by the solicitors of the parties. Our opinion is, that the decree of the chancellor must be reversed, and a decree here rendered dismissing both the original and the cross bill, at the cost of the appellee, John Shahan.

FAY *vs.* HALL.

1. A writing in these words: "Sir—At Mr. S.'s request, I have concluded to stand his security for the hire of two boys, not exceeding $220, for the year 1847. Dec. 31, 1846,"—held a collateral guaranty which required notice of acceptance within a reasonable time, there being no new consideration between the parties.
2. In an action on a guaranty, where notice of acceptance is necessary to charge the guarantor, notice must be averred in the declaration; but the general allegation ("of all which aforesaid premises the said defendant," &c., "then and there had notice"), when the declaration states facts on which it can operate, is sufficient.
3. The declaration must also aver the terms of the credit given to the principal debtor, and his failure to pay.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. NAT. COOK.

ASSUMPSIT by Bolling Hall against Edwin Fay, on an instrument of writing, of which the following is a copy:

"MR. HALL: Sir—At Mr. Scott's request, I have concluded to stand his security for the hire of two boys, not exceeding $220, for the year 1847. Yours,

"Dec. 31, 1846. EDWIN FAY."

The declaration contained the common counts and four special counts. The first special count alleges that, in consid-

eration that plaintiff, at defendant's special instance and request, "would hire and deliver two boys for the year 1847 to one George G. Scott, not exceeding the sum of $220," defendant undertook and faithfully promised said plaintiff to stand security for the hire of said boys; and plaintiff avers, that he, confiding in defendant's said promise and undertaking, afterwards, to-wit, on the first of January, 1847, did hire and deliver to the said Scott two negro slaves, then and there agreed upon between them, which the said Scott then and there had occasion for during the year 1847, at and for certain reasonable prices then and there agreed upon between said Scott and plaintiff, amounting in the whole to $220;" and although the hire of said two boys has long since passed, and the prices so agreed upon for their hire have been long since due, yet the said Scott, although he was afterwards, to-wit, on the — day of ——, at ——, to-wit, in the county aforesaid, requested by said plaintiff so to do, hath not as yet paid the said sum of $220, nor any part thereof, but hath hitherto wholly neglected and refused so to do; of all which aforesaid premises the said Edwin Fay afterwards, to-wit, on the — day of —— aforesaid, then had notice. Yet the said Fay, not regarding his said promise and undertaking, hath not as yet accounted with plaintiff, nor paid him said sum of money, nor any part thereof, for the hire of said two boys, although he was afterwards requested; but hath hitherto wholly neglected," &c.

The second count alleges that, on the 31st December, 1846, it was agreed between plaintiff and defendant that defendant should stand security for the sum of $220, to be paid by Scott for the hire of certain slaves for the year 1847, in consideration that plaintiff would credit said Scott for said sum of $220; and plaintiff avers that he, confiding in said undertaking of defendant, and at his special instance and request, did afterwards, to-wit, on the first day of January, 1847, give the credit aforesaid to said Scott, and hire the said slaves to him for the year 1847, for said sum of $220; and although said sum of money has been long since due, and said Scott often requested to pay the same, yet he has not paid the same, nor any part thereof, but has hitherto wholly neglected and refused so to do; of all which said premises the said defendant afterwards had notice, yet he has wholly failed to pay, though af-

terwards requested, and said sum of $220 still remains due and unpaid, &c.

The third count alleges, that said Fay, in consideration that plaintiff would hire two negro boys to said Scott for the sum of $220 for the year 1847, and notes of said Scott to be thereafter drawn amounting to said sum of $220, and give said Scott credit on said notes until the first day of January, 1848, undertook and faithfully promised to secure the payment of said notes; and plaintiff avers, that he, confiding in defendant's said promise and undertaking, did hire said slaves to said Scott for the year 1847, and took his notes for the amount of the hire, with a credit until the first day of January, 1848; of all which said premises said defendant then and there had notice, yet, not regarding his said promise and undertaking, he hath not yet paid said sum of money, though often requested so to do, but wholly neglects and refuses, and the same is still wholly due and unpaid, &c.

The fourth count alleges, that the defendant, in consideration that plaintiff would hire two negro boys (slaves) to said Scott for the year 1847, for the sum of $220, and would credit said Scott for said sum of money, undertook and promised to pay said sum of $220; and plaintiff avers, that he, confiding in the said promise and undertaking of defendant, afterwards hired the said slaves to said Scott for the year 1847, for the sum of $220, and credited him for said sum of money; of all which said premises said defendant had notice, yet he has wholly failed to pay, &c.

The defendant demurred to the first, second, third and fourth counts separately, and pleaded to the others *non assumpsit*, payment, set-off, and submission and award. The demurrer to each count was overruled.

It is unnecessary to notice the evidence in the case, as no question is here presented upon it. The court charged the jury as follows: "That the above writing, signed by Fay, was an original undertaking, and contained an absolute promise to pay, subject only to the condition that the hiring should take place; and that, if plaintiff did hire the negroes to Scott for a sum not exceeding $220, then Fay became absolutely liable for the amount of such hiring, and no act was necessary to be done by plaintiff, except the hiring, to entitle

him to recover the whole amount of the hiring, not exceeding $220;" to which charge defendant excepted.

The overruling of the demurrers to the declaration, and the charge of the court, together with other matters not material to the points here decided, are now assigned for error.

F. BUGBEE, for the appellant:

The demurrers to the declaration ought to have been sustained. The first count is defective in not alleging special notice of acceptance, and failure to pay on the part of Scott; the second, because no notice is alleged, and the terms of credit to Scott are not stated; the third and fourth do not allege the time of credit, nor that it had expired, nor that Scott had not paid, nor that defendant had notice.—Lawson v. Townes, 2 Ala. 375; Nesbit v. Bradford, 6 *ib.* 747. This is not like the case of a guaranty of a note or bill, where the debt is specific in all its terms. Notice, in such a case as this, must be specially averred; the general allegation, "of all which aforesaid premises," &c., is not sufficient.—2 Ala. 375; 6 *ib.* 747.

The proper construction of the paper is to be inferred only from its terms, for there is no evidence of any stipulation or contract of hiring. From the tenor of the instrument it is evident that something more was yet to be done, either on the part of Fay, or Hall, or some other person. Fay had promised Scott that he would stand his security, if necessary, or, perhaps, if desired; he agreed, not to pay the debt, but to become Scott's security for it, evidently standing behind him, and keeping up the relation of principal and surety. Such a contract is a collateral guaranty, which requires notice of acceptance and demand of payment from the principal debtor, before the guarantor can be charged.—Russell v. Clark's Ex'rs, 7 Cranch 90; McIver v. Richardson, 1 M. & S. 557; Stafford v. Low, 16 Johns. 67; Beekman v. Hale, 17 *ib.* 134; Douglass v. Reynolds, 7 Peters 125; Murray v. King, 5 B. & A. 165; 2 Ala. 373; 6 *ib.* 747.

N. S. GRAHAM, *contra:*

The instrument sued on is an original undertaking, and was a promise to pay Hall the price that might be agreed on between Scott and Hall for the hire of two negroes, not ex-

ceeding $220, for the year 1847. Both Scott and Fay, when the contract of hire was consummated, were liable jointly or severally.—Bates v. Starr, 6 Ala. 697; Chitty on Con. 408; Chase v. Day, 17 Johns. R. 114.

The cases of Nesbit v. Bradford, 6 Ala. 746, and Lawson *et al.* v. Townes, Oliver & Co., 2 Ala. 373, are not applicable to this case; not certainly the latter, because the action there was upon a letter of credit, addressed to no particular person, and was not for a particular amount; neither are any of the authorities referred to by counsel for plaintiff in error, because it will be found upon examination that the defendants in those cases, created their liability after their principal, and when the debt they guarantied existed at the time; in short, was not, as this case, the first step towards creating a debt or liability, and the cause of the credit given. This is a promise before the debt becomes due,—is an absolute engagement to pay, conditioned only that the contract of hiring should be made for two negroes, for the year 1847, not exceeding $200. Donley v. Camp, 22 Ala. 659, and numerous authorities there cited, in the opinion of Judge Goldthwaite.

The doctrine of notice, as applicable to negotiable or commercial paper, does not apply here.—3 Kent's Com., 7th edit.; Lee v. Dick, 10 Pet. 496.

A surety cannot relieve himself from his obligation as surety, by giving notice to the creditor that he will not be answerable any longer.—Theobald on Prin. & Sur. (1 vol. L. Lib.,) p. 89; Calvert v. Gordon, 3 Mann. & Ry. 124; Clay's Dig. 532, § 6.

The case of Lawrason v. Mason, 3 Cranch 492, is on an instrument very similar to this, and fully sustains this action—being an action in assumpsit against the sureties.

Neither of the letters relied upon in the case of Russell v. Clark's Executors, cited by plaintiff in error, contained any intimation of any intention of the writers to become answerable to any one, for any debt that might be created, and are not applicable to the case at bar.

A demand of payment is necessary only to fix an endorser or a surety, whose undertaking is conditional.—Allen v. Rightmere, 20 Johns. 366; Tillman v. Wheeler, 17 *ib.* 326; 12 Mass. 14.

The instrument, in the case of Douglass and others v. Reynolds *et al.*, 7 Peters, upon its face shows that the guarantors were to pay only in the event that "Chester Haring fails to do so." There is no such condition in this case at bar.

The case in 1 Maul. & Selwyn, is also inapplicable; that was simply a suggestion that the writer had no objection to guaranty for his friend; and it was in proof that that was not satisfactory and other security required.

There is a distinction between a contract of suretyship and the contract of guaranty. The surety is immediately liable; the guarantor is, like an endorser, only liable upon condition.

There was no notice to sue verbally, or in writing, and to avail himself of the defence that damage has ensued by the failure to sue, the surety must plead and prove that the principal had become insolvent after notice, and the means of recovering the debt had been lost by such neglect.—Bruce v. Edwards, 1 Stew. 11; Herbert & Kyle v. Hobbs & Fennell, 3 *ib.* 1.

GOLDTHWAITE, J.—The writing which was the foundation of the action, was, in effect, an agreement on the part of Fay to be responsible to Hall as the surety of Scott, if the latter should hire of him two slaves, for the year 1847, at a price not exceeding two hundred and twenty dollars. It is clear this was not an original undertaking on the part of Fay, as it was not founded on any new consideration between himself and Hall, and because it is evident from the words used that he did not intend to charge himself as the original debtor. He is to stand as "*security*" for Scott—in other words, to become responsible for his engagement, which is in law a guaranty (Parsons on Con. 493); and this being the case, the rights of the parties must be determined by the principles which govern contracts of this character. In Lawson v. Townes, 2 Ala. 373, the letter of credit was future in its application, and uncertain in its amount; and it was held, that the guarantors were entitled to notice within a reasonable time that credit had been given to the principal debtor on the faith of the guaranty. In Donley v. Camp, 22 Ala. 659, the promise was an absolute, unconditional guaranty of a specific pre-existing debt; and we held, that in such a case no notice

was necessary to be given to the guarantor, and that his liability was perfected by the failure of the principal to pay the debt when it became due. In the present case, as we have seen, the guaranty was future in its application, and the case falls within the influence of Lawson v. Townes, *supra*, and not that of Donley v. Camp.—See, also, Walker v. Forbes, at the present term. It may be, that the first decision is not sustained by the English cases; but there is a strong current of American authorities in its favor (Lee v. Dick, 10 Pet. 482; Adams v. Jones, 12 *ib.* 207; Norton v. Eastman, 4 Greenl. 521; Tuckerman v. French, 7 *ib.* 115; Kay v. Allen, 9 Barr 320; Howe v. Nickles, 22 Maine 175; Hill v. Calvin, 4 How. (Miss.) 231; Taylor v. Wetmore, 10 Ohio 490; Mussey v. Rayner, 22 Pick. 223; Croft v. Isham, 13 Conn. 28); and we do not feel at liberty to depart from them.

It follows from what we have said, that in order to render Fay liable, it was essential that he should have had notice within a reasonable time that his guaranty was accepted by Hall; and as such notice is of the *gist* of the action, it should be averred in the declaration.—Lawson v. Townes, *supra*.—The first count of the declaration sets out the guaranty,—avers that Hall, confiding in the promise of Fay, hired the slaves to Scott for the year 1847, for the sum of two hundred and twenty dollars; that although the hire has become due, Scott has failed to pay the same, and that Fay had notice of these facts and failed to pay on request, &c. We regard the general allegation of notice as to the antecedent premises sufficient, as there are facts stated in the declaration on which it could operate (Lawson v. Townes, 2 Ala. 373, 376; Carlisle v. Cahaba Railroad Co., 4 Ala. 70; Gause v. Hughes, 9 Por. 552); and the reasonableness of the notice cannot arise upon the pleadings, but depends on the testimony to be disclosed on the trial.—Boot v. Franklin, 3 Johns. 208. This distinguishes the present case from that of Walker v. Forbes, at the present term, in which the facts set forth are not sufficient to charge the defendant without notice.

The second count, however, is defective, as it alleges that the guaranty was made by Fay in consideration that a credit should be given by Hall to Scott for the hire of the negroes, and that the slaves were hired upon a credit, but does not

state the time of credit, or when the amount to be paid for the hire became due. The third count is also defective, in not averring the non-payment of the debt by the principal debtor, to whom it alleges the credit was given on the faith of the promise by Fay to secure the amount. It describes the undertaking of Fay as a guaranty, and shows that he is only to answer in default of Scott, and then seeks to charge him as if he had been the original debtor, by resting his liability simply on his failing to pay the debt which he had undertaken his principal should pay. The fourth count is bad for the same reason, and also because, while it avers that the consideration of the promise on the part of Fay was in fact a credit to Scott for the hire, it does not allege the time of such credit.

The court, therefore, erred in overruling the demurrer to the second, third and fourth counts; and also in the charge given, which was, in effect, that Fay was liable as an original promisor, and in holding that he was liable otherwise than as a guarantor.

As the points decided will probably be decisive of the case, on another trial, we consider it unnecessary to determine the other questions presented.

Let the judgment be reversed, and the cause remanded.

DUMAS *vs.* HUNTER.

1. In an action of unlawful detainer, where the defendant, having purchased the premises at sheriff's sale under execution against the plaintiff, received the possession from an under-tenant of plaintiff's lessee after the expiration of the original tenancy, the record of the judgment under which the land was sold, and the sheriff's deed for the premises, are not admissible evidence for the defendant, even "to show that his possession was lawful:" such evidence goes to the merits of the title, and is therefore inadmissible.—Clay's Digest 251, § 5; Code, § 2859.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. ALEX. B. CLITHERALL.

THIS was an action of unlawful detainer, commenced in April, 1852, by Winchester Dumas against Robert Hunter. The complaint states, "that Robert Hunter, on the first day of March, 1852, entered upon, and unlawfully detains" the land in controversy, which is particularly described, "the property of the said Dumas in his own right; and that he has had the peaceable possession of the same for some seven years." The justice of the peace before whom the suit was commenced, gave judgment against the plaintiff, "on a plea that a copy of the complaint and cause of action had not been served and left with the defendant;" from which judgment the plaintiff appealed to the Circuit Court, where a trial *de novo* was had in April, 1854.

On the trial, as the bill of exceptions states, "the plaintiff offered evidence to prove that he was in possession of the land in 1848 and 1849, and had rented the premises in 1850 and 1851 to one Benjamin Neighbours; that Neighbours continued in possession until October, 1851, and in said month of October surrendered the possession to one Jesse Waddle; and that the defendant, in March, 1852, received the possession from said Jesse Waddle. The defendant then, to show that his possession was a lawful possession, offered in evidence a judgment of the Circuit Court of this county at its Fall term, 1851, in favor of Jesse Waddle against said plaintiff, and an execution issued on said judgment; and proved a sale of the premises under said execution by the sheriff on the first Monday in January, 1852, to the defendant, and the sheriff's deed to defendant, dated January 5, 1852. The plaintiff objected to the said evidence, so offered by the defendant, but the court overruled the objection, and charged the jury, that, if said evidence was true, the defendant was not guilty of an unlawful detainer; and the plaintiff excepted, both to the ruling of the court in admitting the evidence objected to, and to the charge given to the jury."

These two rulings of the court are now assigned for error.

E. P. JONES, for the appellant, cited Clay's Digest, p. 253, § 20; Lecatt v. Stewart, 2 Stew. 474; Cunningham v. Greene, 3 Ala. 130.

E. W. PECK, *contra:*

1. The evidence was properly admitted: it was offered but for one purpose, viz., "to show that the defendant's possession was lawful," and it was clearly admissible for that purpose. The fact that it might also be evidence of title, in an action where title was involved, does not prove that it was not proper in this action to show that defendant's possession was a lawful possession; and the fact that it was a record and a deed, amounted to nothing. It was certainly competent for the defendant to prove that his possession was lawful; and whether that fact be proved by parol, or by a deed and judgment, can make no difference: that, like every other fact, must be proved by the best evidence the party has. Suppose the landlord, before the end of the term, sells and conveys to the tenant, and after the expiration of the tenancy, notwithstanding his sale and conveyance, gives the tenant notice to deliver up the possession, and on his refusal proceeds against him for an unlawful detainer; would it not, in such case, be competent for the defendant to prove his purchase, to show that he did not unlawfully detain? and could he prove his purchase unless he did it by the best evidence he had—his deed? And although the deed, in a different action, would be evidence to prove title, it would also be evidence, in the case supposed, to prove the possession lawful. Can there be any difference, in principle, whether the sale is made by the landlord himself, or by an officer of the law for him? Suppose Waddle had purchased at the sheriff's sale, might he not have remained in possession after the expiration of his lease, without being guilty of an unlawful detainer? Suppose the defendant, after his purchase at the sheriff's sale, had demanded the possession of Waddle; might not the latter have surrendered it to him? or was he bound to take upon himself the hazzard and expense of a law suit? The purchaser at sheriff's sale may, if the possession be vacant, lawfully enter; or, if himself the tenant, may lawfully remain in possession after the expiration of his tenancy.

LIGON, J.—1. We think it very clear, that the court erred in allowing the appellee to read in evidence to the jury the record of the judgment in the case of Waddle against

the appellant, and the deed from the sheriff to him for the premises when they were sold under that judgment, against the objection of the appellee. The 2859th section of the Code expressly declares, that "the estate, or merits of the title, cannot be inquired into on the trial of any complaint" of the kind here presented; and it is too clear to admit of argument, that the admission of the proof objected to tended, necessarily and inevitably, to involve an examination of the merits of the title under which the appellant claims the possession. This was not the question before the jury; but the issue submitted to them, and which alone they were required to try, was, whether the appellee was in possession of the premises under such circumstances as would constitute his holding them, after demand in writing by the appellant, an unlawful detainer.

It is said, however, that this evidence was offered to show that the possession of Hunter was lawful; but the most casual examination will show that this could not be done, by this proof, without inquiring whether the estate of Dumas had not been determined by the sale and conveyance of the premises by the sheriff to another. It has been said, and repeated by this court, that the statute against forcible entries and unlawful detainers was intended to protect possession; and the purchaser of the title at sheriff's sale has no more right to enter without the consent of him who is in possession, than any other person with a lawful title. In the present case, the tenant in possession voluntarily gave it up to the purchaser at the sheriff's sale; but this, we apprehend, did not invest the latter with a lawful right to hold against the landlord.—Clark v. Stringfellow, 4 Ala. R. 353; Lecatt v. Stewart, 2 Stewart 474.

We have, on this branch of the case, adopted, in a great degree, the language of Mr. Justice Goldthwaite, in Clark v. Stringfellow, *supra*, which, on this point, was almost identical with the case at bar.

It may be said, however, that the statute under which the former case was decided, and the section of the Code which defines an unlawful detainer, are essentially variant. In respect to possessions obtained and held under circumstances such as mark the present case, there is no essential difference,

if, indeed, any in fact exists. The former statute (Clay's Digest 251, § 5) enumerates with greater particularity what acts of holding over shall constitute an unlawful detainer and who might be guilty of it, than does section 2852 of the Code; but the latter, when taken in connection with rules of the common law, governing tenancies, is as full as the former statute. By the terms of the act cited from Clay's Digest it is provided, that one collusively obtaining possession from the tenant who is in under contract with the landlord, and holding over after the expiration of the term for which the premises are let, and who refuses to surrender the possession to the landlord, after lawful demand made, shall be guilty of an unlawful detainer. Section 2852 of the Code defines an unlawful detainer to be, "where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent, or attorney."

We apprehend it will scarcely be contended, that if the tenant should under-let the premises to a third person, for an unexpired portion of his term, and the sub-tenant should hold over under such circumstances as would have made the original tenant guilty of unlawful detainer, he (the sub-tenant) would be guiltless. In respect to the terms of possession, the sub-tenant would be placed in the same situation with him from whom he derived his possession, and the landlord is entitled to the same remedies against him, to recover it if it is unlawfully withheld. Indeed, the duties of the sub-tenant to surrender the possession to the landlord, at the expiration of the term, are the same which the law attaches to the tenant himself, and so, also, are the landlord's remedies to recover it when withheld.

In the present case, it is shown that Dumas rented the premises in dispute to Neighbours for the years 1850–'51, Dumas himself having possessed them during the years 1848 and 1849; that in October, 1851, Neighbours, while tenant of Dumas, put Waddle in possession, and he (Waddle) in March 1852, after the expiration of the term of Neighbours, under whom he entered, put the defendant into possession, who, on demand lawfully made, refused to deliver the posses-

sion to the landlord. At the time Hunter obtained the possession from Waddle, the latter was the tenant at will of Dumas; and the former, by thus obtaining the possession, occupies the same relation; and the fact that he held the sheriff's deed to the premises does not, of itself, change that relation.

As the charge of the court is general, and based upon the testimony thus illegally admitted, it is erroneous.

Let the judgment be reversed, and the cause remanded.

STEPHENS *vs.* WESTWOOD.

1. A transcript from the books or papers on file in the General Land Office, or in the Indian Bureau of the Department of the Interior, if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence.
2. After the location of an Indian reservee under the treaty of March 24, 1832, no valid entry of the land embraced in the reservation could be made; and consequently, a patent issued on such invalid entry, as against the reservee or those claiming under him, would be void.
3. If the location is proved by the Government records to have been regularly made, it cannot be collaterally impeached, even by one holding a patent from the United States.
4. In trespass to try titles, a verdict finding that "the land belongs to the plaintiff" will be held sufficient, on error, under the liberal rules of intendment, to support a judgment in favor of plaintiff for damages and costs, and the award of a writ of *habere facias possessionem*.
5. If no claim or suggestion for improvements is made by the pleadings, (Clay's Digest, p. 320, § 47,) the defendant cannot complain, on error, of the action of the court in refusing to allow him to offer evidence of the value of his improvements.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

TRESPASS TO TRY TITLES to a certain tract of land, between John Westwood and Theophilus Stephens, both of whom claimed under patents from the United States. At the January term, 1852, of the Supreme Court, a former judgment of the Circuit Court was reversed, and the cause remanded.—See 20 Ala. 275.

Another trial was had, as appears by the present record, at the Spring term, 1854, when the jury returned the following verdict: "We, the jury, find the land mentioned in the plaintiff's declaration belongs to the plaintiff; and we further say, that we assess the damages sustained by the plaintiff at nine dollars"; and on this verdict the court rendered judgment against the defendant for the damages and costs of suit, and awarded a writ of *habere facias possessionem.*

It appears from the defendant's bill of exceptions, that the plaintiff, after proving the defendant's possession, the value of the rents, &c., offered in evidence a certified copy of an approved contract between Scehecharche, a Creek Indian reservee under the treaty of March 24, 1832, and Nat. Macon Thornton & Co., by which the said Scehecharche sold the land in controversy to the said Thornton & Co.; which contract was assigned by said Thornton & Co. to G. E. Thomas & Co., by Thomas & Co. to Littleberry Moody, and by Moody to plaintiff. To this was attached the following certificate:

"*General Land Office, Sept.* 1, 1852.

"I, John Wilson, acting commissioner of the General Land Office, do hereby certify, that the foregoing are true copies of original papers on file in this office. In testimony whereof, I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, this first day of September, 1852. (Signed)

[L. S.] JOHN WILSON, Acting Comm'r."

To the introduction of this evidence the defendant objected, but the court overruled the objection, and he excepted. The plaintiff then offered in evidence a certified transcript from the Department of the Interior, purporting to be an extract from a book of locations on file in that office, made by one of the United States locating agents, showing that Scehecharche was located by him on this land in 1834, as her reservation under the treaty. This transcript was certified by Charles Mix, as "acting Commissioner of Indian Affairs," to be a true copy of the original on file in his office; and attached to his certificate was that of Robert McClelland, Secretary of the Interior, that said Mix was the acting Commissioner of Indian Affairs. The defendant also objected to the introduction of

this transcript, but his objection was overruled, and the transcript allowed to go to the jury; and the defendant excepted.

The plaintiff then read in evidence his patent from the United States, dated December 10, 1845, which recited that said Scehecharche became entitled to the said land as her reservation under the said treaty of March 24, 1832; that she had sold and conveyed to said Thornton & Co., by and with the approbation of the President of the United States; that Thornton & Co. had conveyed to Thomas & Co., who had conveyed to Moody, who had conveyed to Westwood.

The defendant then offered in evidence two patents from the United States; one, dated May 1, 1839, conveying a portion of the land to himself; and the other, dated April 5, 1837, conveying the other portion to William K. Stephens. Both of these patents recite, that the land was sold under the provisions of the act of Congress of April 24th, 1820. "Defendant then offered a witness to prove that no Indian had ever been located on the land in controversy; plaintiff objected; the court sustained the objection, and ruled out the evidence; and defendant excepted. Defendant also offered evidence of the value of improvements made by him on the land, and claimed to have them allowed him, because his possession had been adverse; which proof, on plaintiff's objection, the court excluded, and the defendant excepted. Defendant then offered a transcript from the Land Office at Montgomery, to show that no Indian had ever been located on said land; plaintiff objected; the court ruled out the evidence; and the defendant excepted." This transcript contains certified copies of entries made on the land by said William K. and Theophilus Stephens in 1835 and 1837, and the date of their patents, as above shown; and the register further certifies, that the west half of the section, which does not embrace any of the land in controversy, is marked on the maps in his office as an Indian reservation.

The errors assigned are, 1st, that the court erred as shown in the bill of exceptions; and, 2d, in rendering the final judgment, and awarding the writ of *habere facias possessionem* and costs against the defendant, upon the verdict shown in the judgment entry,—"said verdict not finding that the land belonged to the plaintiff at the commencement of the action,

and said declaration and verdict not authorizing said final judgment."

S. F. RICE, with whom was J. T. BROCK, for appellant.

P. M. ALLISON and M. ANDREWS, *contra.*

CHILTON, C. J.—The United States, being the source of title, had the right to dispose of and issue a patent for the land in controversy according to law; but having issued two patents to different claimants, the question is, to whom did it pass the title?

The transcripts from the General Land Office and the Indian Bureau of the Department of the Interior were properly received in evidence, being copies of what appeared on file in those departments, properly certified under the seal of such departments by the proper officers.

These showed that the land in controversy was assigned to a Creek Indian as her reservation under the treaty, concluded at Washington between the United States and the Creek Tribe, of 24th March, 1832; that she sold according to the forms prescribed by the President of the United States, who approved the sale, and that by mesne tranfers her title became vested in the plaintiff (Westwood), to whom a patent issued. The patent to Stephens issued before that to Westwood, but upon entries made in the land office at Montgomery, of date subsequent to the location of the Indian.

Now, if the Indian was located by the proper authorities of the United States, and entitled to the land by virtue of the treaty above mentioned, the Government had no power to sell the land; and consequently, no valid entry could be made of it, and a patent issued upon such entry would be void, as against the reservee, or those duly deriving title from her. The grant or patent to Stephens would be nugatory and worthless, for the reason, that the Government had no right to the land granted, having previously made a valid disposition of it. See this case reported in 20 Ala. Rep. 278; Ladiga v. Rowland, 2 How. (U. S.) Rep. 581; Wilcox v. Jackson, 13 Peters 498; Crommelin v. Minter, 9 Ala. 594.

It is manifest from what we have said, that, in a controversy between those claiming under these conflicting patents, the

question of right must depend upon whether the Indian, under whom Westwood asserts a prior claim, was located upon the land or entitled to it under the treaty. He has shown that she was located and entitled, by the transcript from the locating agent's record of locations, properly certified, and which appears in evidence; and upon this evidence, unimpeached, coupled with the patent and transfers and approved Indian's deed, the court would have been entirely justified in charging the jury, that the title was with the plaintiff,—that the patent to Stephens was void, the Government having made a valid disposition of the land; and that the treaty under which such disposition was made, aside from the general law, expressly provided such lands should be reserved from sale, and authorized the reservee to dispose of them to any other person in such manner as the President might direct.

After a census was taken by the United States of the Creek Tribe, and the heads of families ascertained and designated upon the census roll, a copy of this roll, containing a list of the heads of Creek Indian families who were entitled to reservations under the treaty, was furnished to the locating agents, and they were instructed by the proper department to proceed and designate, opposite the name of each Indian entitled to a reservation, the particular tract to which he or she was entitled, including the improvement of each reservee in his selection, if the same could be done; and if not, then that the Indians who could not be so located should take in one body of a proper form. This designation of the land opposite the name of the Indian upon the rolls of the locating agents, which were forwarded to Washington and filed in the public archives, constituted "the location." The questions whether the Indian was the head of a family, and entitled under the treaty to the particular tract set apart for her, have been decided by the officers of the Government, and are not subject to be revised in this collateral way. It would be a shocking perversion of the spirit of the treaty, to require the reservee, whose claim, after repeated investigations by the several Government officers, has been fully recognized and confirmed by the United States, to prove her right to a location, or that she was actually placed in possession of the land allotted to her. The United States proceeded, in the fulfil-

ment of the obligations imposed by the treaty, in a manner peculiar to itself, and adapted to the condition of this half-civilized people. The Government was not bound down by the strict rules of the common law, in receiving proof of their being heads of families, and entitled under the treaty to locations; but acting as a sovereign, and desirous of carrying out the treaty in good faith, it was proper that a liberal policy should be adopted. The testimony of Indians was received; the chiefs of the respective Indian towns were generally consulted, and their reports were generally accredited, as indeed they were found in most cases to be very reliable, and their rights, in many instances, depended wholly upon the testimony of their people. Our courts, however, receive no such proof, and to subject them now to the maintenance of those rights according to the forms which our law prescribes, we should exclude the evidence upon which alone the Government acted, in many cases, and thereby defeat their claims, which were not only guarantied by solemn treaty stipulation, but recognized and sanctioned by the Government itself. We can never consent to minister to such bad faith to the reservees and those claiming under them.

In our opinion, the action of the Government, in ascertaining the heads of families, and setting apart their lands, or locating them, as we have above shown locations were made, when returned by the respective Government officers, and confirmed by the department entrusted with the matter by law, becomes final, and no one has a right to put the reservee upon proof, other than that furnished by the Government records, of her right to the land set apart opposite her name as her reservation. It follows, therefore, that the offer in the court below to show that this reservee was not located, when the Government record shows that she was, is an attempt to impeach collaterally the Government record, and was properly disallowed. If, in designating the sections or fractions of sections reserved from sale, the officers of the General Land Office failed to mark this land as reserved, whereby the Land Office at Montgomery, Ala., permitted it to be entered, this mistake should not be allowed to prejudice the claim of the Indian reservee, or those claiming under her. The party thus making the entry must look to a just Government for repara-

tion, and cannot be allowed to defeat a prior (and therefore a better) right which had vested in another. It follows from what we have said, that there was no error in excluding from the jury the certificate of the register of the Land Office at Montgomery.

As to the verdict: It is not very formal, but it is general; and under the liberal rules of intendment which apply in such cases, we are of opinion that it fully warrants the judgment, *which must be affirmed.*

No claim or suggestion for the improvements was made by the pleadings, and it is needless, therefore, to notice this subject further.—Clay's Dig., p. 320, § 47; *ib.* 336, §§ 134-5.

Judgment affirmed.

DEVANY'S HEIRS *vs.* DEVANY'S ADM'RS.

1. Under the Code (§1888) an appeal does not lie to the Supreme Court, on an order of the Probate Court for the sale of real estate belonging to a decedent.

APPEAL from the Court of Probate of Franklin.

GOLDTHWAITE, J.—This is an appeal from an order of the Probate Court for the sale of lands belonging to the estate of Charles Devany. The record shows, that the deceased died on the 24th July, 1853, and the petition bears date on the 14th of September, 1853; consequently, the proceedings are governed by the provisions of the Code, which does not allow an appeal on an order of this nature.—§ 1888.

Appeal dismissed.

SPENCE *vs.* SAVERY, ADM'R, &C.

1. When letters of administration are granted to a sheriff *virtute officii*, and after his removal from the State *ex parte* proceedings are instituted against him to compel a settlement of his administration, all the preliminary orders of the court must show that he was proceeded against in that capacity; especially when it is shown that, after the expiration of his term of office as sheriff, he took out letters of administration individually, and gave a new bond with new sureties.
2. The objection may be raised for the first time on error assigned by the defendant, that the preliminary proceedings, in which he is described as "administrator *de bonis non*," are not sufficient to support a final decree, by default, against him as "late sheriff of said county, and *by virtue of his office as sheriff administrator de bonis non*," &c.
3. And the fact that the estate had been previously declared insolvent on the report of the defendant, will not prevent him from raising the objection, when the record shows that the estate was not otherwise treated as insolvent, and the final decree against him is in favor of a succeeding administrator *de bonis non*.

ERROR from the Court of Probate of Talladega.

IN the matter of the estate of John C. Calhoun, deceased.

THE record shows the following facts: One D. A. Griffin, as sheriff of Talladega, was appointed administrator of said Calhoun's estate in September, 1841, and on the 17th March, 1842, the appellant, who succeeded Griffin as sheriff, was appointed administrator *de bonis non* by virtue of his office; he reported the estate insolvent in July, 1842, and it was so declared by the court on the same day; afterwards, on the 6th May, 1845, his term of office as sheriff having expired, letters of administration on said estate were granted to him in his individual capacity, and he thereupon executed a new bond with new sureties. In September, 1846, his sureties on this last bond having become insufficient, he was cited by the court to give new sureties; and having failed to comply with this requisition, he was subsequently removed from the administration, which was then committed to William Easley, as sheriff of the county, on the 7th September, 1846.

At a special term of the court, held on the 8th June, 1847, a citation was ordered to issue against Spence, "late admin-

istrator of said estate of John C. Calhoun, deceased," requiring him to appear on the first Monday in August next thereafter," and exhibit his accounts and vouchers for settlement with William Easley, the present administrator;" but no further proceedings seem to have been had under this order. In December, 1848, after the expiration of Easley's term of office, the succeeding sheriff being interested in the estate as one of the sureties on Spence's second bond, the administration of the estate was committed to Jos. N. Savery, the appellee, as coroner of the county. At the regular January term, 1849, Savery filed his petition in court, suggesting that Spence had been appointed administrator of the estate in 1842, and had never made a settlement of his administration, and praying that a citation might issue requiring him to appear and make such settlement on the first Monday in February then next.

At the next regular term, on the 5th February, 1849, "came Joseph N. Savery, administrator *de bonis non* of the estate of William King, deceased, and as a creditor of the estate of John C. Calhoun, deceased, moves the court for an order of publication against said Solomon Spence, requiring him to file his accounts and vouchers for settlement of said estate;" and it appearing to the satisfaction of the court that said Spence was appointed administrator *de bonis non* of said estate in 1842, and that he has removed beyond the jurisdiction of the court without having settled his said administration, and that Savery, as the administrator of said William King, is a creditor of said Calhoun's estate,—it was therefore ordered, that publication be made, &c., requiring said Spence to appear before the court on the first Monday in May next thereafter, and file his accounts and vouchers for settlement of said estate.

At the regular May term, 1849, as the order recites, "Solomon Spence, administrator *ex officio* of said estate, in obedience to a former order of this court, a non-resident, was cited by publication," &c., "to appear in court on this day, and file his account current and vouchers for a settlement of said estate; and said Spence not having appeared, as required by said citation, thereupon Lewis E. Parsons appeared, and asked for a decree against said Spence, and in favor of Jos. N. Savery,

the present administrator of said estate; thereupon came John T. Morgan, who stated to the court, that he appeared as attorney for said Spence, for the purpose of making proof to the court as to the manner in which the account current should be stated against said Spence, and did not appear for the purpose of filing an account for said Spence; and it was ruled by the court, that said Morgan could not appear for that purpose, and in that way, nor offer his proof;" and the court then proceeded, as on the default of said Spence, to state an *ex parte* account against him, and rendered the following decree: "It is therefore ordered, adjudged, and decreed, that said Joseph N. Savery, administrator *ex officio* of the estate of said John C. Calhoun, deceased, recover of said Solomon Spence, late sheriff of said county, and administrator of the estate of said Calhoun, the sum of $4,461 68, the amount of the account this day stated against him; for which let execution issue." On the 6th August, 1849, an execution having been issued on this decree, and returned "no property found," a statutory judgment was rendered against the sureties of said Spence on his official bond as sheriff.

At a special term of the court, held on the 14th July, 1851, as the next minute entry recites, "came Joseph N. Savery, administrator *de bonis non* of the estate of William King, deceased, and as a creditor of the estate John C. Calhoun, deceased, moved the court for an order of publication against Solomon Spence, requiring him to file his accounts and vouchers for settlement of his administration of said estate; and it appearing to the satisfaction of the court that said Spence was appointed administrator *de bonis non* of said estate on the 17th day of March, 1842, and that he has removed beyond the jurisdiction of the court without having settled his accounts as such administrator, and that the said Joseph N. Savery, as the administrator of the estate of said King, is a creditor of said estate, it is therefore ordered," &c., that publication be made for three consecutive months, requiring said Spence to appear on the second Monday in November next, and file his accounts and vouchers for a settlement of said estate.

The minute entry of November 10th, 1851, after setting out at length the order of 14th July preceding, recites that pub-

lication had been made in pursuance of said order for three months, and that said Spence came not, but made default; whereupon the court proceeded to state an *ex parte* account against him, ascertaining a balance in his hands of $3,603 76, and ordering that the account so stated be reported for allowance on the second Monday in January next thereafter, and that notice thereof by publication for three consecutive weeks be given accordingly.

At the regular January term, 1852, "came Jos. N. Savery, administrator *de bonis non* of the estate of John C. Calhoun, deceased;" and the minute entry, after setting out the orders of the preceding July and November terms, and reciting that publication had been made for three consecutive weeks as directed by said last mentioned order, and that Spence came not, but made default,—proceeds thus: "It is therefore ordered by this court, that the account stated by this court, at the regular term held on the 10th day of November last, be in all things allowed and confirmed, and hereinafter recorded as the final settlement by said Spence of his administration of the said estate, as follows:" &c. The account is then copied in the entry; after which follows the decree, in these words: "It is therefore ordered, adjudged, and decreed by this court, that the said Joseph N. Savery, as the administrator *de bonis non* of the estate of said John C. Calhoun, deceased, recover of the said Solomon Spence, late sheriff of said county, and *ex officio* administrator *de bonis non* of the estate of said John C. Calhoun, the sum of $3,603 76, the amount of the account stated against said Spence, as such administrator *de bonis non*, at the regular term of this court held on the 10th day of November, 1851, and this day allowed and confirmed; for which let execution issue."

On this decree Spence sued out a writ of error, and he here assigns for error, "1st, that the court erred in rendering any decree in favor of Joseph N. Savery, who had been the administrator *de bonis non* of Calhoun's estate in virtue of his office of coroner of Talladega county, but whose term of office, as shown by the record, had expired before the decree of January 12, 1852, was rendered; 2d, in rendering any decree in the case on the 12th January, 1852; 3d, in rendering a decree against said Spence as late sheriff of Talladega

county, and *ex officio* administrator *de bonis non* of Calhoun, when the notice by publication had no reference to that administration, but to another and subsequent administration; 4th, the court erred as shown by the record."

MORGAN & MARTIN, for plaintiff in error:

1. The estate of Calhoun was never regularly declared insolvent, and the court erred in so treating it, on the settlement. If the estate is not insolvent, it was error to decree in favor of an administrator *de bonis non*, against an administrator *de bonis non*. The statute of 1846 only authorizes such a decree where an administrator *de bonis non* calls the administrator in chief to settlement. The rule established in Willis v. Willis, adm'r, 9 Ala. 721, is applicable to this case.

2. The administration of Spence, *virtute officii*, had ceased with the expiration of his office of sheriff; and a new administration had been granted to him as an individual, and new letters had issued. This administration was essentially different from that then just expired, and was attended with new incidents; a new bond had to be given, a new oath administered, and regularly a new inventory of assets, &c., should have been made. The publication calling upon Spence to settle his accounts, refers to the first administration of Spence upon the estate, and treats him not as an individual, but as *ex officio* administrator *de bonis non* of said estate; but in the entry stating the account against Spence, he is referred to as administrator of John C. Calhoun, without any designation to show which administration is meant. The judgment is against Spence, late sheriff and *ex officio* administrator of John C. Calhonn. The account stated against Spence is founded alone upon the amount of notes received by "Solomon Spence, administrator of the estate of John C. Calhoun, deceased, of his predecessor D. A. Griffin, which, it appears to the court by proof, could have been collected by his using due diligence." In all this there is not sufficient certainty. Either the two administrations of Spence are blended and confused, or else the last administration is still open. The order for publication and the decree should have cleared up all this difficulty, and have shown which administration was being settled. If both administrations were to be settled,

the order should have shown it, so that the securities on the different bonds (Spence not appearing) could have appeared for him, and have seen that the proper decree was rendered in each case.

3. The judgment against Spence, being a summary proceeding, must disclose a sufficient state of proof to support it. The record shows that the liability of Spence was for an omission or failure to collect notes turned over to him by Griffin, his predecessor; having shown this much, the record should have further disclosed how it was that Spence became bound to collect those notes. Were they assets of the estate? Were they payable to Griffin, or the intestate? Does the record show that they were assets of the estate? Does the record show when Griffin turned them over to Spence? Suppose a declaration had been filed upon one of Spence's bonds, disclosing as a breach only the facts recited by the court to support its judgment, would it be good? It is no answer to these questions, to say that the court was not obliged to disclose the reasons or facts upon which its judgment is rested. The court has disclosed, and the record shows the reasons to be insufficient. If Spence's liability grows out of his negligence, it must be a neglect to perform some duty imposed by law.

4. The record shows that Savery was not the coroner at the time the decree in his favor, as administrator in virtue of his office, was rendered. On the 23d of December, 1848, Savery, who was then coroner of Talladega county, was appointed administrator *de bonis non* of the said estate, and the administration, as well by the order of the court, as by the law, was attached to the office, and not to the person. There is no evidence in the record that Savery was at any time re-appointed coroner, or administrator, in his individual capacity, of said estate; but the record does show, that on the 12th day of January, 1852, more than three years after the date of his appointment, as *ex officio* administrator, "Savery, who was, on the 23d day of December, 1848, appointed by the Orphans' Court of said county, administrator, &c.," was in virtue of said appointment claiming and procuring this decree against Spence. It would be dangerous, as well to the estate as to Spence, to put the assets of the estate, by the de-

cree of the court, in the hands of a late coroner, whose bond had ceased to be security for his conduct in office.

5. Which of the decrees found in the record will the court sustain, the first or the last?

WHITE & PARSONS, *contra:*

The record shows all the facts necessary to give the court jurisdiction: that Spence, as the administrator of Calhoun, had failed to settle his accounts with the estate, and had removed beyond the jurisdiction of the court; that Savery, as administrator of William King, was a creditor of the estate, and as such applied for and obtained the publication required by the statute; and that this publication was made, and the account then stated. This publication brought the administrator into court for the settlement of his accounts, and he was then entitled to no further notice: the further notice required by the law was not intended for his benefit, and he cannot complain of the want of it.—Willis v. Willis, 16 Ala. 656; Davis v. Davis, 6 *ib.* 611; Treadwell v. Burden, 8 *ib.* 660. All that the administrator was entitled to, was the time intervening before the next term of the court, to avail himself of the proviso in the statute of 1843; and this he received.—Wright v. Clough, 17 Ala. 495.

The suggestion to the court was made by Savery, as administrator of King's estate, and as such a creditor of Calhoun's estate. The decree was rendered in the name of Savery, as administrator *de bonis non* of Calhoun's estate, as the representative of all the creditors of that estate, under the authority of the act of 1843. This act received an interpretation justifying this course, in Long v. Easley, 13 Ala. 239, and Willis v. Willis, 9 *ib.* 721.

The estate of Calhoun was declared insolvent in 1842, and is therefore not subject to the provisions of the act of 1843. The court had the power to act as it did on the defendant's report of insolvency, and he cannot now be heard to gainsay its insolvency.—Martin v. Baldwin, 7 Ala.; Brown v. Isbell, 11 *ib.*

The objection that Savery had no right to the judgment at the time of its rendition, cannot now be raised, even if it was a good objection: no exception was taken in the court below;

no objection on this ground made; no issue formed or tried on the point; and the plaintiff in error cannot now, after putting it out of the defendant's power to try this question of fact before the appropriate tribunal, be allowed to raise the objection here for the first time.—Lamkin v. Heyer, 19 Ala. 232; Croft v. Ferrell, 21 *ib.* 356. Even if Savery had begun this proceeding without any right to sue, the plaintiff in error must have pleaded the incapacity, either in abatement, or in bar.—5 Peters 501; 6 *ib.* 450; 1 Bos. & Pul. 40. If the disability accrued during the pendency of the suit, the reasons are much stronger for requiring that the defence should be interposed in the court below. But, even if it were shown that Savery had ceased to be administrator *pendente lite*, there would be no actual disability: it was still competent for him to recover, unless the defence was interposed, and he and his sureties would be liable upon their bond for the money, if recovered, or for neglect of duty, if he had failed to prosecute this suit.—Sloan v. McKinney, 19 Ala. 116; Gayle v. Elliott, 10 *ib.* 270; Driver v. Riddle, 8 Porter 343. A judgment by default is conclusive of the rights of the parties, and fully determines all defences which might have been urged against the demand before the judgment was rendered: the recovery of a judgment is an admission of the cause of action as laid, and that the money is legally due to the plaintiff.—McGehee v. Childress, 2 Stew. 206; Mervine v. Parker, 18 Ala. 241.

LIGON, J.—We esteem it wholly unnecessary to consider all the points presented in the assignments of error, and in the briefs of the counsel, inasmuch as we find it impracticable to sustain the judgment and decree of the Probate Court of Talladega, on the record before us.

It appears that Spence, as sheriff of Talladega county, was appointed administrator *de bonis non* of John C. Calhoun, deceased, of whom his predecessor in the office of sheriff (David A. Griffin) had been administrator *virtute officii*. The administrations of both Griffin and Spence, so long as the latter was sheriff, were strictly attached to the office of sheriff. It follows, as a consequence, that all orders, the tendency and object of which were to bring about a settlement of Spence's accounts of his administration of Calhoun's estate, while he

managed it under his appointment as administrator *ex officio*, should show that he was proceeded against in that character; especially as, upon the expiration of his term of office, he procured letters of administration to be issued to him on the same estate in his individual capacity, and gave another bond, with other sureties, who were different from those whose names appear upon his bond as sheriff.

In none of the orders of the court in this record, preliminary to the final decree against him, is it shown that he was required to settle his administration as sheriff. On the contrary, the form adopted by the Probate Court is such as would be only allowable in a proceeding against him on his administration as an individual. This being the case, it was clearly erroneous for the court below to render its final decree against him as administrator by virtue of his office, and on the return of the *fi. fa.* against him *nulla bona*, to render the statutory judgment against his sureties on his bond as sheriff, and award execution thereupon.

His sureties on his sheriff's bond, had they been advised by the notice served upon their principal, or the publication made in the newspaper, that it was designed to charge him in his character of administrator by virtue of his office of sheriff, would have had the unquestionable right to appear on the statement of the account, and question its accuracy, inasmuch as the decree founded upon it would be conclusive against them. But they could claim no such right, in a proceeding against him the object of which was, to coerce a settlement of his accounts on his individual administration.

It is insisted, however, that this objection to the proceedings should not be allowed to be taken for the first time in this court, and the case of Croft v. Ferrell *et al.*, 21 Ala. 351, is relied upon as conclusive upon this point. The cases are unlike, on the very point which controlled the decision in the case cited. In that case, the guardian was in court when the account was stated, acting through his counsel, and excepting to the ruling of the court in some respects; but, having failed to except to the ruling of the court on the question of notice, he was held to have waived it there, and this court refused to consider it when assigned for error here. In the present case, there was no appearance by the administrator, nor by any

person claiming to represent him, as counsel or otherwise, and the recitals of the decree show that it was rendered as on default of the administrator; for it is stated, "that the said Spence came not, but made default." This, then, must be regarded as a decree, or judgment on default, and it needs no citation of authorities to establish that, in such cases, the defendant will not be considered to have waived the right to complain in the appellate court of any error or irregularity which may have occurred in the proceedings against him in the primary court. In such cases, the party complaining, or occupying the position of plaintiff, is bound, at his peril, to take such preliminary steps as will sustain the judgment of the court in his favor, or, in other words, to show a judgment legally and regularly obtained, when it is sought to be reviewed in a direct proceeding, such as this is.

As we have before said, the preliminary steps in this case are all taken against *Solomon Spence*, administrator *de bonis non* of John C. Calhoun, deceased, without, in any manner, connecting his administration with his office of sheriff. He was, as the record discloses, administrator in his own right, as well as by virtue of his office of sheriff, and consequently these preliminary proceedings must be held to have been had against him on his individual administration; and whether they be regular or otherwise, they will not justify the decree found in the record, which is against "Solomon Spence, late sheriff of said county, (Talladega,) and *by virtue of his office as such sheriff* administrator *de bonis non* of the estate of John C. Calhoun, deceased."

As the record shows that Spence, in July, 1842, reported the estate of Calhoun to be insolvent, and the court, accepting the report, declared it such by an order of that date, it may be supposed that the conclusion we have attained in this case conflicts with the decisions of this court in the cases of Watts *et al.* v. Gayle & Bower, 20 Ala. 817, and Clarke v. West *et al.*, 5 *ib.* 117. An examination of all these cases, however, will show that there is not even a seeming inconsistency. The facts and the parties litigant in the cases cited, are essentially different from those in the case at bar, and the rules of law and practice which apply to and control them are also different. In the cases cited, the judgment or decree

of the Orphans' Court was obtained under the rules which apply to and govern the settlement of insolvent estates, and are provided by law for that purpose; and the questions presented arose between the creditors of the estate and the sureties of the administrator. Every order taken to effect the settlement, in each case, shows that the estate was treated as insolvent; and this court held, that the administrator of an estate, regularly declared *insolvent*, and settled as such, could not complain of want of notice of the time of settlement, because he was the *actor* in the matter, and considered to be always in court, and consequently cognizant of all orders taken in the proceeding to effect a settlement; and as he could not avail himself of such want of notice, neither could his sureties. But in this case, although the record shows a report of insolvency, and an order declaring the estate to be so, in the year 1842, yet there is not another order in it, up to the rendition of the decree complained of, in 1852, which treats it as an insolvent estate, and the judgment sought to be reviewed in this court is in favor of Savery, not as a creditor, but as administrator *de bonis non* of John C. Calhoun, deceased. It would, therefore, be manifestly improper, to apply to this case the rules which govern in cases of insolvent estates declared and settled as such.

Our opinion is, that the decree must be reversed, and the cause remanded.

CHILTON, C. J., not sitting.

INDEX.

ADVERSE POSSESSION.

1. Where a part owner of a slave has possession, claiming only an undivided half interest, and acknowledging the title of the other part owner to the other half, his possession is not adverse, although "he refused to deliver the possession to any one until his portion should be allotted to him."—Cotten v. Thompson, 671
2. If no claim or suggestion for improvements is made by the pleadings, (Clay's Digest, p. 320, § 47) the defendant cannot complain, on error, of the action of the court in refusing to allow him to offer evidence of the value of his improvements.—Stephens v. Westwood, 716

See STATUTE OF FRAUDS, 1.

AGENCY.

1. A receiving and forwarding merchant cannot, unless under some special contract, custom, or usage of trade, forward cotton to a port without instructions from his principal, and direct its delivery on arrival to a commission merchant.—Love & Co. v. Davis, 335
2. Although an agent to make a tender cannot delegate his authority to another, yet he may make the tender by letter sent by the hands of another.—Couthway v. Berghaus, 393
3. Warehouse-men may maintain *assumpsit* for cotton "shipped by them as warehouse-men only," and not delivered to consignees; *provided* the contract was made with them personally.—Fry v. Carter & Howell, 479

AMENDMENT.

1. A case will not be remanded that the bill may be amended, when the amendment would make a different case from that stated in the bill.—Crabb's Adm'r v. Thomas, 212
2. The court has a discretion, under the Code, to allow an amendment of the complaint by the addition of another count, even after the jury has been instructed.—Prater v. Miller, 320
3. The defendant in a writ of *ad quod damnum*, sued out by the lessee of the City Water Works of Mobile, can only be taxed with the costs of the appeal, and the attendance of witnesses; but if the court renders judgment against him for the costs of the whole proceeding, and he takes an appeal to the Supreme Court, the proper amendment will there be made at his costs.—Burden v. Stein, 456
4. An error in the imposition of costs, being amendable in the primary

AMENDMENT—CONTINUED.

court, will be amended in the Supreme Court at the cost of the appellant.—Commissioners' Court of Russell v. Tarver, 489

5. An error of the clerk, in introducing in the judgment entry the name of a stranger as guardian of the plaintiff, may be amended by reference to the declaration on file, in which plaintiff declared in his own name without the intervention of a next friend or guardian; and it therefore will be amended on error or appeal, at the costs of the appellant.—Kennedy & Merritt v. Young, 563

6. When a judgment entry is amended *nunc pro tunc* during the pendency of a writ of error, and the amendment brought up on *certiorari* previously sued out, the amended judgment is properly before the court.—Cunningham v. Fontaine, 644

APPEALS AND WRITS OF ERROR.

1. The actions of the primary courts on applications for continuances, is matter of discretion, and not revisable on error or appeal.—Starr v. The State, 49

2. Affidavits cannot be received in the Supreme Court, to contradict the certificate of a probate judge, as to the time when an appeal was taken from his decision; but when the officer only certifies that an appeal was taken on a specified day, and "that A. E. is the security of said appellant for the costs of said appeal," affidavits may be received to show that the security was not given at the time when the appeal was taken; and when such affidavits are filed, a special *certiorari* will be awarded, on motion, requiring the probate judge to certify the time when the security was executed and lodged in his office.—Carey v. McDougald's Adm'r, 109

3. Security for the costs of an appeal cannot be taken in the Supreme Court; if the security is not given in the primary court, the appeal will be dismissed. 109

4. A decision of the Supreme Court is conclusive when the case in which it was rendered is brought back a second time on appeal.—Bryan & Wife v. Weems, ex'r &c., 195

5. A rule which has become settled law, is binding on the courts, and should be followed.—Martin's Executrix v. Martin, 201

6. A case will not be remanded that the bill may be amended, when the amendment would make a different case from that stated in the bill.—Crabb's Adm'r v. Thomas, 212

7. A judgment of the Circuit Court, rendered on an award, affirmed on error, because the record did not affirmatively show that the award was obnoxious to the objections urged against.—Waring & Co. v. Gilbert & Bro., 295

8. When the appellees are infants, who sued by their next friend, the appeal bond (§ 3018) should be made payable to them, and not to their next friend.—Cooper v. Maclin's Heirs, 298

9. The failure on the part of the appellant to apply for a citation to the appellee, does not affect the validity of the appeal; the appellee may avoid delay by appearing. 298

10. One surety to an appeal bond (§ 3041) is sufficient. 298

11. An appeal will not be dismissed because the record shows that a writ

APPEALS AND WRITS OF ERROR—CONTINUED.

of error was sued out on the judgment, when it does not appear that any transcript was filed at the term to which the writ was returnable, and the judgment has not been affirmed. 298

12. Plaintiffs in attachment having assigned for error the several rulings of the court shown by the bill of exceptions in the admission and exclusion of evidence on the trial, while the judgment entry (only reciting that the garnishee answered orally denying all indebtedness to the defendant in attachment, and that it was therefore ordered by the court that he be discharged) excluded the idea that there was any trial, or that the garnishee's answer was even controverted, the *judgment was affirmed, and the rulings of the court set out in the bill of exceptions were not considered.*—Marriott & Hardesty v. Lewis, 332

13. If the names of the sureties for the costs of the appeal are shown by the record, although not mentioned in the clerk's certificate, it is sufficient.—Hall & Wife v. Wallace. 438

14. When a case is submitted to the decision of the judge without the intervention of a jury, his judgment on the law of the case is revisable on appeal.—Shaw v. Beers, 449

15. If the defendant was present, and objected to the action of the jury "because he was not duly notified of the time when the jury was to assemble," his objection cannot avail, on error or appeal, unless he affirmatively shows that the notice given him was too short to enable him to prepare for the protection of his interest.—Burden v. Stein, 455

16. When the decision of a cause pending in the Probate Court is suspended, by consent of parties, until the opinion of the Supreme Court in another cause therein pending between the same parties can be had, if a judgment is afterwards rendered in which it is recited that the opinion had been received, it will be intended, on error or appeal, that the decision of the probate judge was rendered in open court, in the presence of the parties or their counsel. 455

17. When a transcript is filed after the third day of the term, but before motion to affirm on certificate, the motion to affirm comes too late. —Pearsall v. McCartney, 461

18. Plaintiff in detinue, having recovered only one of the slaves sued for, excepted to the rulings of the court against him, and took an appeal, but afterwards coerced satisfaction of the judgment; this fact having been brought to the knowledge of the appellate court by affidavits, he was required to make restitution by the next term of the court; and now, having failed to comply with this order, his appeal was dismissed.—Earle, adm'r, v. Reid, 463

19. When no *supersedeas* bond, nor security for the costs of the appeal, is given, the cause will be stricken from the docket on motion, although the clerk certifies that "no bond was required because all costs have been paid."—King & Owen v. McCann, 471

20. An error in the imposition of costs, being amendable in the primary court, will be amended in the Supreme Court at the costs of the appellant.—Commissioners' Court of Russell v. Tarver, 480

21. When an appeal is taken by "the solicitor of the complainants," some of whom were infants suing by their next friend, the appeal is not

APPEALS AND WRITS OF ERROR—CONTINUED.

valid so far as the infants are concerned; but as to the adult complainants, the authority of their solicitor will be presumed.—Riddle v. Hanna, 484

22. A bond for security for the costs of an appeal is not necessary; a simple acknowledgment in writing is sufficient, unless the appeal is intended to operate as a *supersedeas*. 484

23. An appellant who has enforced and received satisfaction of the decree, will not be allowed to assign errors, until he has done what is necessary to place the appellee in *statu quo*. 484

24. The appellee cannot insist on error in the ruling of the court below, allowing an amendment, when the ruling is not covered by the assignments of error.—Russell v. Desplous, 514

25. An appeal bond does not require the written approval of the clerk endorsed on it: it is a sufficient approval in fact if the officer to whom the duty is entrusted signifies his assent by receiving it.—Williams v. McConico, 538

26. In this case, the appellant producing satisfactory evidence to raise the presumption that his bond was accepted by the probate judge at the time the appeal was taken, although the written endorsement on the bond referred its approval to a subsequent day, a special *certiorari* was awarded, on motion, requiring the probate judge to certify the time when he accepted and received the bond, without reference to his written endorsement. 538

27. If the defendant, after an irregular decree *pro confesso* has been entered against him, appears by solicitor, and makes motions in the cause, without objecting to the irregularities in the decree, he will be held to have waived them, and cannot take advantage of them on error.—Bank of St. Marys v. St. John, Powers & Co., 566

28. When a cause is submitted at a regular term of the court, and held under advisement until vacation on request of defendant's solicitor, the defendant cannot complain on error that the chancellor rendered his decree in vacation. 566

29. When a judgment entry is amended *nunc pro tunc* during the pendency of a writ of error, and the amendment brought up on *certiorari* previously sued out, the amended judgment is properly before the court.—Cunningham v. Fontaine, 644

30. Under the Code (§ 1888) an appeal does not lie to the Supreme Court, on an order of the Probate Court for the sale of real estate belonging to a decedent.—Devany's Heirs v. Devany's Adm'rs, 722

ARBITRATION AND AWARD.

1. A judgment of the Circuit Court, rendered on an award, affirmed on error, because the record did not affirmatively show that the award was obnoxious to the objections urged against it.—Waring & Co. v. Gilbert & Bro., 295

2. A chancery suit for the abatement of a livery stable as a nuisance was referred to arbitration by order of the court, and it was ordered that complainant's bill should be dismissed if she did not comply with the conditions of the award by the next term of the court. The arbitrators having awarded an exchange of lots between the parties, and

ARBITRATION AND AWARD—CONTINUED.

the payment by complainant of the estimated difference in the value of the lots, and the complainant having failed to comply with the award, her bill was afterwards dismissed: *Held*, that the award was not final until the parties had performed, or offered to perform, the acts required to be done by them respectively; and therefore, a plea to an action on the injunction bond must aver performance, or a readiness to perform, on the part of the pleader.—Jessee v. Cater, 851

ASSIGNMENT.

1. A person who has obtained a judgment in his own name, and promised in writing to pay a specified sum out of its proceeds, when collected, to another, is bound to use due diligence in the collection of it; and if only the sum specified is collected, the promisee has a preference right to it.—Gliddon v. McKinstry, 246
2. Where several notes, taken for the purchase money of land, are assigned at different times, the assignment of each is, *pro tanto*, an assignment of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes.—Griggsby v. Hair, 327
3. An assignment of a note without recourse by the vendor, amounts to an abandonment of the lien; but whether or not the parties intended to abandon the lien, is a matter of fact to be gathered from the evidence and the nature of the transaction. 327
4. When a policy of insurance is assigned after a loss has accrued, the assignee may maintain an action on it in his own name, either under the act of 1828 (Clay's Digest, p. 383), or under the Code (§. 2129), although it contains the usual stipulation against assignment.—Perry v. Merchants' Insurance Company, 355
5. The assignee's right to sue is not affected by a stipulation in the policy for its renewal, if it had expired without renewal before the assignment, and the right of renewal was gone with the partial destruction of the property. 355
6. An assignment of "all the loss or damage which accrued under the policy prior to" a specified day, passes the whole interest in the policy to the assignee, when it is shown that the loss had accrued, and the policy expired, before that day. 355

ASSUMPSIT.

1. After a recovery in trespass to try titles, trespass for the mesne profits accruing after the rendition of the judgment and before the execution of the writ of possession, lies against the defendant in the first action, or against any one coming into possession under him; but if the tenant, in such case, comes into possession under an express promise to pay rent to the defendant, the plaintiff cannot maintain *assumpsit* for use and occupation against him.—Shumake v. Nelms' Adm'r, 126
2. In assumpsit on a collateral guaranty, no recovery can be had on the common counts; and a special count, which does not set out the terms of the contract between the guarantee and the principal debtor, is fatally defective on demurrer.—Walker v. Forbes, 139

ASSUMPSIT—CONTINUED.

3. A recovery cannot be had upon an entire contract for the building of a house, without averring and proving performance; but where the employer discharges the workman on discovering a violation of the contract on his part, telling him to make out his bill for the work done, and promising to pay it to get rid of him, and the workman accordingly presents his account and quits the service, this is a mutual rescission of the contract; and if the work is used by the employer, and is of any value to him, the workman may recover its value on a *quantum meruit*.—Kirkland v. Oates, 465

4. Warehouse-men may maintain *assumpsit* for cotton "shipped by them as warehouse-men only," and not delivered to the consignees, *provided* the contract was made with them personally.—Fry v. Carter & Howell, 479

5. In assumpsit on a promissory note, if the defendant, after appearance, withdraws his plea, the court may render judgment for the amount of the note and interest thereon, without regard to the amount of damages laid in the declaration.—Kennedy & Merritt v. Young, 563

6. A railroad company, of which both plaintiff and defendant were directors, transferred to the former, by resolution of the board of directors, a quarter's pay due from the Postoffice Department on a contract for carrying the mail, (which contract was in defendant's name,) as collateral security for his endorsement of a note for the benefit of the company, which he subsequently paid; and afterwards, by another resolution, transferred the same quarter's pay to defendant for the purpose of paying other debts, which defendant accordingly paid: *Held*, that the plaintiff might maintain *assumpsit* for money had and received against the defendant, to the amount paid on the note.—Sherrod's Ex'rs v. Hampton, 652

ATTACHMENT.

1. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. As against the bank, if the bill is verified by affidavit, and alleges that the bank is located in another State, and has property and choses in action in this State, it may also be sustained under the attachment law of 1846; and if it further alleges that the notes were issued and put in circulation in this State by the president, who is charged to be the principal stockholder and a non-resident, it is also well filed against him under that act.—Bank of St. Marys, Winter, *et al.*, v. St. John, Powers & Co., and Henley, 566

2. When a bill in equity is filed, under the attachment law of 1846, against a debtor who is alleged to be a non-resident, the defendant cannot deny his non-residence. 566

3. Stock in a plank-road company is a chose in action, which may be subjected in equity under the attachment law of 1846. 566

BAIL.

1. When a non-resident is arrested under a bail writ, and compelled to give bond to keep out of jail, *mandamus* from the Supreme Court does not lie to compel the Circuit Court, on its refusal, to discharge the bail.—*Ex parte* Small, 74
2. An affidavit, made by a debtor in custody under bail process, "that he has no moneys, estate, or effects, real or personal, in possession or in expectancy, within the State of Alabama, *subject to levy and sale by execution*," without adding "*whereby to satisfy the debt*."—was not sufficient to warrant his discharge under the act of 1839 (Clay's Dig., p. 71, § 3), but it is sufficient under the Code (§ 2182).—Goldsmith, Forcheimer & Co. v. Lang, 486
3. Proceedings instituted by a debtor (who was in custody under bail process sued out before the Code went into operation, but was surrendered by his bail after that time,) to obtain his discharge, must conform to the provisions of the Code. 486

BANKS AND BANKING.

1. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. Such a bill may be maintained under the general powers and jurisdiction of the court, which regards the capital stock of the company, and all its assets, as a trust fund for the payment of its creditors, and the directors, stockholders and agents as trustees.—Bank of St. Marys, Winter, *et al.*, v. St. John, Powers & Co., and Henley, 566
2. As against the bank, if the bill is verified by affidavit, and alleges that the bank is located in another State and has property and choses in action in this State, it may also be sustained under the attachment law of 1846; and if it further alleges that the notes were issued and put in circulation in this State by the president, who is charged to be the principal stockholder and a non-resident, it is also well filed against him under that act. 566
3. If the president of a foreign bank is required by its charter to be a resident of the State in which it is located, he cannot, when sued by its creditors here, be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold that office by reason of his residence in this State. 566
4. The surrender to a bank agent of its notes, and the acceptance from him of his draft on a third person, is but the substitution of one security for another, and does not extinguish the original liability on the notes, unless the draft is drawn in good faith, and accepted as an absolute payment and discharge of the notes; and even if it was, through the fraud of the agent, accepted as an absolute payment, the fraud would prevent it from so operating. 566
5. If a bank allows its stockholders to withdraw its funds to the amount of their subscriptions, and to use them, without security, in their private business, such conduct is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn,

BANKS AND BANKING—CONTINUED.

and each agent who participated in the fraud individually responsible for the amount traced to his hands and all profits made from its use. 566

6. An officer or stockholder of a foreign banking corporation, who issues and puts in circulation in this State its notes, is individually liable for their payment.—Clay's Dig., p. 133, § 3. 566

7. If a bank, on the eve of insolvency, having notes out which it cannot redeem, and a large claim on a solvent stockholder for money lent, extends his debt by taking his notes, payable at two and three years, with its president as sole surety,—this is a fraud on its creditors, and they may proceed in equity directly against such debtor, without a judgment at law or process of garnishment. 566

8. When defendants are held liable on the original bank notes held by complainants, they are liable only for the amount of the bills and interest, and not for statutory damages on a draft which was substituted for the notes, and was protested for non-payment. 566

BONDS AND COVENANTS.

1. In an action on a detinue bond, a recovery may be had (under a special allegation) for the value of the hire of the property during the whole time the defendant was deprived of its use, although, after he had failed to give the statutory bond, the property was delivered to the plaintiff upon his execution of a second bond for its forthcoming, as provided by the statute.—Hudson v. Young, 376

2. Where the payment of money, secured by a penal bond, is made to depend on the performance of a condition precedent, an action cannot be maintained on the bond until the condition has been fully performed.—Rives v. Baptiste, 382

3. The doctrine in relation to partial performance of mutual covenants which go to a part only of the consideration on both sides, where the part unperformed can be compensated in damages, (Boone v. Eyre, 1 H. Bla. 273, n. a,) has no application to the case of a penal bond for the payment of money on the performance of a condition precedent. 382

4. Although the courts will not require the performance of every minute particular of a condition, unless its full and exact performance is a part of the essence of the contract; yet, where the execution of a trust deed is a condition precedent to the payment of money secured by a penal bond, the obligor has a right to insist upon a complete execution of the trust before he can be held liable on his bond. 382

5. When an action at law is brought on a penal bond conditioned for the payment of money on the performance of a condition precedent, and the defendant files a bill to obtain a discovery as to the execution of the trust which constituted the condition, if the answer of the obligee discloses that the trust has not been fully executed, the court may enjoin the action at law, without compelling the obligor to account for the benefit received from the partial performance.—Rives v. Toulmin, 452

6. A court of equity has no power to change contracts fairly entered into, nor can it, unless under special circumstances, relieve against the consequences of the non-performance of a condition precedent. 452

CASE, ACTION ON THE.

1. In case, to recover damages for the loss of a slave who was killed while working on defendant's house, if the declaration avers fraudulent concealment by defendant of the dangerous condition of the house, and also fraudulent representations that it was safe, it is not demurrable for duplicity, but the latter averment may be stricken out as surplusage.—Perry v. Marsh, 659
2. In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable, precisely as a third person, if the loss or injury is caused by his neglect or want of care. 659
3. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if it is known to him; and if he fails to make this disclosure, and the workman, while engaged in the service, thereby sustains an injury, the employer is responsible in damages. 659
4. If the concealment of the danger by the employer amounts to a breach of duty sufficient to support an action on the case for damages, an additional averment of fraudulent intent may be stricken out as surplusage. 659

CHANCERY.

1. A married woman may come into equity, suing by her next friend, to protect her separate property from levy and sale under executions against her husband, if her trustee refuses to interpose a claim at law. Bridges & Co. v. Phillips, 136
2. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to the separate use of the wife, will be reformed in equity on her application.—Love v. Graham, 187
3. A married woman, whose trustee refuses to interpose a claim at law to protect her separate estate when taken in attachment by her husband's creditors, may come into equity for relief. 187
4. As to slaves which are shown to have been purchased by the husband with his own means, although the bill of sale was taken in the name of his father as trustee for his wife, the injunction will be dissolved, and the creditor allowed to proceed at law; but as to others which are shown to have been partly purchased with choses in action belonging to the wife's separate estate, the injunction will be perpetuated, without prejudice to the creditor's right to file a bill to separate the interest of the husband from that of the wife. 187
5. Where the bill asks a reformation of the marriage articles, an injunction against the proceedings at law on the part of the husband's cred-

CHANCERY—CONTINUED.

itors, and general relief. if it also appears that the trustee named in the deed has resigned, the court may appoint another in his stead. 187

6. A married woman, whose separate estate if levied on by her donor's creditors, and who has no trustee to protect her interest at law, may come into equity for relief.—Crabb's Adm'r v. Thomas, 212

7. If the trustee, without the sanction of the *cestuis que trust*, receives lands in settlement and satisfaction of the trust debts, equity will hold him responsible for whatever loss may ensue, and, if the *cestuis que trust* so select, treat the lands as his own individual property.—Royall's Adm'r v. McKenzie, 363

8. The assignee of a title bond, who is notified at the time the transfer is made that one of the tracts of land embraced in the bond has been previously sold to another, and who afterwards takes to himself a conveyance for the entire tract, will be held in equity a trustee of the legal title for the benefit of the prior purchaser.—Dickinson & Winn v. Any, 424

9. Suspicion of fraud on the part of the defendant, coupled with gross inadequacy of price, and the pressure of pecuniary embarrassment on the part of complainant, is sufficient to induce a court of equity to rescind a contract of sale.—Lester v. Mahan, 445

10. In this case the contract was rescinded, upon proof that the complainant, who was in embarrassed circumstances, (his property levied on, and about to be sold under execution,) sold his farm to defendant, received part of the price in cash, and for the residue accepted a deed from defendant to a tract of land lying in Georgia, which complainant had never seen, and which was not worth more than half the amount at which it was estimated in the transaction. 445

11. When an action at law is brought on a penal bond conditioned for the payment of money on the performance of a condition precedent, and the defendant files a bill to obtain a discovery as to the execution of the trust which constituted the condition, if the answer of the obligee discloses that the trust has not been fully executed, the court may enjoin the action at law, without compelling the obligor to account for the benefit received from the partial performance.—Rives v. Toulmin, 452

12. A court of equity has no power to change contracts fairly entered into, nor can it, unless under special circumstances, relieve against the consequences of the non-performance of a condition precedent. 452

13. Although bills for the specific performance of contracts are addressed to the discretion of the court, yet this is not an arbitrary or capricious discretion, but one which is regulated, as nearly as may be, by general rules.—Pulliam v. Owen & Russell, 492

14. The vendor cannot, after he has received full payment of the purchase money, resist a specific performance of his contract, on the application of the vendee's assignee, on the ground that the vendee has committed trespasses on his other lands, and is insolvent. 492

15. The Chancery Court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*.—Preston v. Dunn, 507

16. The improper exercise of this power may be reviewed on error, but

CHANCERY—CONTINUED.

the act itself is not void; and the decree rendered cannot be collaterally attacked by the infant for want of jurisdiction, although the appointment was made without service of process. 507

17. A court of equity will not rescind a contract for the sale of lands, on account of a defect in the title, when a conveyance has been executed and accepted, and there is no fraud or misrepresentation; but where there is a misrepresentation of a material fact, which was believed and acted upon by the party seeking relief, it is immaterial, in the view of a court of equity, whether or not the party making the statement knew it to be false.—Lanier et al. v. Hill et al. 534

18. When the vendee makes out a case which entitles him to a rescission of the contract, the collection of the purchase money will be enjoined, without regard to the solvency of the vendor; and the same rule obtains against an assignee of the vendor, unless the notes were mercantile and passed in the course of trade to a *bona fide* holder. 534

19. The note-holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. Such a bill may be maintained under the general powers and jurisdiction of the court, which regards the capital stock of the company, and all its assets, as a trust fund for the payment of its creditors, and the directors, stockholders and agents as trustees.—Bank of St. Marys, Winter, et al., v. St. John, Powers & Co., and Henley, 566

20. As against the bank, if the bill is verified by affidavit, and alleges that the bank is located in another State, and has property and choses in action in this State, it may also be sustained under the attachment law of 1846; and if it further alleges that the notes were issued and put in circulation in this State by the president, who is charged to be the principal stockholder and a non-resident, it is also well filed against him under that act. 566

21. Although a court of equity considers and treats real property, purchased with the partnership funds, and held for the purposes of the firm, as constituting part of the stock of the partnership, it leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners.—Lang's Heirs v. Waring, 625

22. If the heirs of the deceased partner are sued, in equity, by a derivative purchaser from the surviving partner, for a divestiture of title, they have the right to show that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity should not sanction; and the fact that the firm is insolvent, and that all its assets are required to pay the debts, is no answer to their right to defend. 625

23. The case of Andrews' Heirs v. Brown (21 Ala. 437) was not intended to establish the doctrine, that a court of equity, in all cases where the surviving partner has disposed of the real estate of the firm, however unfair, inequitable, or unauthorized such disposition might be, would compel the heirs to convey: such a doctrine cannot obtain in equity. 625

CHANCERY—CONTINUED.

24. If the surviving partner dispose of the real estate of the firm for a grossly inadequate consideration, and under such circumstances as were well calculated to cause it to be sold for an almost nominal sum, equity will not lend its aid to perfect such a sale; especially, when its action is invoked by one whose conduct contributed, in all probability, to bring about the sacrifice. 625

25. The surviving partner having executed a mortgage, in his own name only, on real estate belonging to the firm, to secure the payment of notes which he had executed in the name of the firm as surviving partner, but which created no obligation as against the firm, the land was subsequently sold under judgments, older than the mortgage, which had been rendered against him as surviving partner, and was purchased by one of the plaintiffs, who thereupon entered upon the land, and was in possession at the time of the sale under the mortgage, at which sale the land, though worth $8000, brought only $250; the first purchaser, having bought the interest of the second, and compromised with the administrator of the deceased partner, filed his bill in equity against the heirs to obtain a divestiture of their legal title: *Held*, that the court should not lend its aid to perfect such a sale, nor disturb the legal title of the heirs. 625

26. The maxim "*caveat emptor*," as applicable to sheriffs' sales, holds as well in equity as at law. 625

27. If the plaintiff in execution purchases at the sheriff's sale, after having indemnified the sheriff, and with notice of a defect in the title, he cannot come into equity, after paying a recovery had against him by the true owner, to be relieved of his purchase.—McCartney v. King, 681

28. Although a court of equity may, in certain cases, relieve against a mistake of law, yet the mistake must be gross and palpable, and such as would warrant the belief that an undue advantage was taken of the complainant, owing either to his imbecility of mind, or to the exercise of some improper influence over him either by the party with whom he dealt, or by some other person with the knowledge, consent, or procurement of that party.—Dill et al. v. Shahan, 694

29. If an executor purchase lands belonging to his testator's estate, at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, he cannot be relieved of his purchase in equity. 694

See PLEADING AND PRACTICE IN CHANCERY.

CODE, CONSTRUCTION OF.

1. An indictment (under the Code) for trading with a slave, is fatally defective, when the slave is described as "a slave, the property of Benajah S. Bibb, whose name is to the jury unknown."—Starr v. The State, 38

2. An indictment (under the Code) which charged that the defendants "before the finding of the indictment, assaulted and beat B. B., against the peace and dignity of the State of Alabama," held sufficient, on the authority of Noles v. The State, 24 Ala.—Thompson v. The State, 41

CODE, CONSTRUCTION OF—CONTINUED.

3. An indictment (under § 1059 of the Code) which charges that the defendant, before the finding of the indictment, "sold spirituous liquor, without a license, and contrary to law," is sufficient; and under it the defendant may be convicted, on proof, of selling to a person of known intemperate habits.—Elam v. The State, 53
4. Section 2355 of the Code does not deprive the court of the right to give explanatory charges after having given the charge asked in writing; on the contrary, it is the duty of the court to simplify and explain the charge given, by such additional instructions as will prevent a misunderstanding or misapplication of it.—Morris v. The State, 57
5. An indictment (under the Code) for gaming charged, that the defendants "played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted": *Held*, that the indictment was sufficient on demurrer, and was not violative of the tenth section of the first article of the State constitution.—Burdine v. The State, 60
6. To support an indictment under section 3108 of the Code, the accusation must be the moving cause of the assault; if the assault was committed upon the provocation that the person assaulted had whipped the defendant's son, the defendant would be guilty of an assault and battery, but not of the statutory offence.—Underwood v. The State, 70
7. A chancellor has power under the Code (§§ 561, 3008, 3009, 3010, 3011) to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders.—*Ex parte* Walker, 81
8. A suit commenced by a corporation, without first giving security for the costs, as required by section 2398 of the Code, will be dismissed on motion.—Ala. & Tenn. River R. R. Co. v. Harris, 232
9. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398 of the Code; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served. 232
10. A complaint (under the Code) alleged the contract sued on to be "in substance as follows: That in consideration that plaintiffs would then and there buy out the store-house and lot, situate in the town of C., then occupied by M. L. E. & Co. as a store-house, and the stock of dry goods then and there owned by them, he (the defendant) would assist them, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously"; or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business": *Held*, on demurrer being interposed, that the contract was too indefinite and uncertain to support an action.—Erwin & Williams v. Erwin, 236
11. In declaring (under the Code) against a person for neglecting to use due diligence in the collection of a judgment, out of the proceeds of which, when collected, he had promised in writing to pay a specified amount, it is not necessary to aver in what respect he had failed to

CODE, CONSTRUCTION OF—CONTINUED.

use due diligence: an allegation that "he has failed and omitted to do so from mere neglect," is sufficient.—Gliddon v. McKinstry, 246

12. The court has a discretion, under the Code, to allow an amendment of the complaint by the addition of another count, even after the jury has been instructed.—Prater v. Miller, 320

13. When a policy of insurance is assigned after a loss has accrued, the assignee may maintain an action on it in his own name, either under the act of 1828 (Clay's Digest, p. 383), or under the Code (§ 2129), although it contains the usual stipulation against assignment.—Perry v. Merchants' Ins. Co. 355

14. When an action is brought by summons and complaint (under the Code) on a promissory note and an open account for work and labor done, it is error to render judgment final by default, for the aggregate amount of the sums claimed, without the intervention of a jury or the execution of a writ of inquiry.—Beville v. Reese, 451

15. An affidavit, made by a debtor in custody under bail process, "that he has no moneys, estate, or effects, real or personal, in possession or in expectancy, within the State of Alabama, *subject to levy and sale by execution*," without adding "*whereby to satisfy the debt*,"—was not sufficient to warrant his discharge under the act of 1839 (Clay's Digest, p. 71, § 3), but it is sufficient under the Code (§ 2182).—Goldsmith, Forcheimer & Co. v. Lang, 486

16. Proceedings instituted by a debtor (who was in custody under bail process sued out before the Code went into operation, but was surrendered by his bail after that time,) to obtain his discharge, must conform to the provisions of the Code. 486

17. Under the Code (§ 2645) a surety, who has paid a judgment rendered on a guardian's bond against himself and his two co-sureties, is entitled to a summary judgment, on motion, against one of his co-sureties, for one half the amount paid, when the other surety is insolvent, and the principal was dead before the judgment was rendered.—Waller v. Campbell, 544

18. A bill of exceptions, which was not reduced to writing and presented to the judge for signature within the time prescribed by the statute, cannot be established (Code, § 2356) upon proof that the cause, which involved less than $20, was submitted to the judge without the intervention of a jury, and was held under advisement by him,—that the counsel of the party excepting frequently applied to him to know whether he had decided it, and was told by him that he had not; and that a judgment was afterwards rendered by him without notifying the counsel, although they were in daily attendance on court, of which they had no notice whatever until after the expiration of the time prescribed for signing bills of exceptions.—Stein v. McArdle & Waters, 561

19. Under the Code (§ 1888) an appeal does not lie to the Supreme Court on an order of the Probate Court for the sale of real estate belonging to a decedent.—Devany's Heirs v. Devany's Adm'rs, 722

See APPEALS AND WRITS OF ERROR.

CONSTITUTION.

1. An indictment (under the Code) for gaming charged, that the defendants "played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted": *Held*, that the indictment was sufficient on demurrer, and was not violative of the tenth section of the first article of the State constitution.—Burdine v. The State, 60
2. The Legislature is not restricted by the State constitution from imposing such conditions as may be deemed proper and required by the good of the community, upon those who are allowed to retail spirituous liquors, both as regards the persons to whom and the quantities in which they may sell.—Lodano v. The State, 64
3. The doctrine that a civil remedy is merged in a felony, until the prosecution of the felon, is not violative of the constitutional provisions (Art. 1, §§ 14, 20, 29.)—Martin v. Martin, 201

CONTEMPT OF COURT.

1. On an application to the Supreme Court for a prohibition, or other remedial writ, to vacate certain orders of the Chancery Court, in the appointment of a receiver and the imprisonment of the petitioner for contempt of court, in refusing to pay over certain moneys in his hands, the bill will not be examined and construed with the same degree of strictness as to technical accuracy as on demurrer: if it shows that the court had jurisdiction of the parties and the subject-matter, although defective in some matter which might be supplied by amendment, it will be held sufficient, and a prohibition will not be awarded.—*Ex parte* Walker, 81
2. Therefore, in this case, a prohibition was refused, because, it was held, the bill was sufficient to give the court jurisdiction, being filed against a trustee, by persons who showed an interest in the trust fund, to prevent its waste and misapplication. 81
3. The appointment of a receiver is a matter of discretion with the chancellor; and where a bill is filed by the creditors of an estate, against a person who has obtained possession of funds belonging to it by representing himself to be the executor, and who is alleged to be insolvent, a receiver is properly appointed. 81
4. A chancellor has power under the Code (§§ 561, 3008, 3009, 3010, 3011) to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders. 81

CONTRACTS.

1. A guaranty, addressed to a mercantile firm, in these words: "Gentlemen, if you can sell Mr. C. any groceries, I am willing to guaranty the ultimate payment of any bill he may make with you, to the amount of $500," is a collateral undertaking to be ultimately responsible for the demand, if the party to whom the groceries are furnished, after the use of all reasonable and proper means of co-

CONTRACTS—CONTINUED.

ercing payment, fails to pay: and notice of acceptance, as also of the principal's default, is necessary to charge the guarantor.—Walker v. Forbes, 139

2. Notice of acceptance within a reasonable time must be given to the guarantor, except in cases where the agreement to accept is contemporaneous with the guaranty, or constitutes the consideration and basis of it. 139

3. Where the guaranty is of a demand to be created in future, and the terms of the contract are left at the option of the garnishee and the principal debtor, the guarantor is entitled to notice of the principal's default; but if the latter is insolvent when the debt falls due, notice is unnecessary, as the guarantor can sustain no injury from the want of it. 139

4. Sureties, endorsers and guarantors are liable according to the law of the place of their contract. 139

5. A draft drawn by the principal debtor on the guarantor for the amount of the debt, but not accepted by the latter, does not in any way affect the relations of the parties on the original demand, when it does not appear to have been received in payment. 139

6. As to the distinction between propositions, the acceptance of which amounts to a valid contract, and proposals to render a gratuitous kindness, which are not designed to create legal obligations on the parties.—Erwin & Williams v. Erwin, 236

7. A complaint (under the Code) alleged the contract sued on to be "in substance as follows: That in consideration that plaintiffs would then and there buy out the store-house, situate in the town of C., then occupied by M. L. E. & Co. as a store-house, and the stock of dry goods then and there owned by them, he (the defendant) would assist them, by endorsing their paper, and advancing them money, to enable them to carry on the mercantile business advantageously;" or, as alleged in another count, "would endorse for them in Charleston, and, if necessary, advance money to them, to enable them to carry on the mercantile business:" *Held*, on demurrer being interposed, that the contract was too indefinite and uncertain to support an action. 236

8. A person who has obtained a judgment in his own name, and promised in writing to pay a specified sum out of its proceeds, when collected, to another, is bound to use due diligence in the collection of it; and if only the sum specified is collected, the promisee has a preference right to it.—Gliddon v. McKinstry, 246

9. An heir-at-law having employed counsel to contest the probate of her father's will, the devisees promised, in consideration that she would withdraw all opposition and allow the will to be admitted to probate, to pay her a certain sum; but it was not shown that there was any ground for contesting the probate of the will, or any doubt as to its validity: *Held*, that this was not a sufficient consideration to support an action on the promise to pay.—Prater v. Miller, 320

10. A promise by the master to pay stolen money received by his slave, which has not come to his own hands, is without consideration, and will not support an action.—Jelks v. McRae, 440

CONTRACTS—CONTINUED.

11. As to the distinction between severable and entire contracts.—Kirkland v. Oates, 465
12. A recovery cannot be had upon an entire contract for the building of a house, without averring and proving performance; but where the employer discharges the workman on discovering a violation of the contract on his part, telling him to make out his bill for the work done, and promising to pay it to get rid of him, and the workman accordingly presents his account and quits the service, this is a mutual rescission of the contract; and if the work is used by the employer, and is of any value to him, the workman may recover its value on a *quantum meruit*. 465
13. When a slave, who is hired for one month, does not work the full term, no recovery can be had upon the contract, as it is entire.—Petty v. Gayle, 472
14. Evidence of a particular usage to pay *pro rata* on a contract of hiring if the slave does not work the full term agreed on, cannot be received, since the usage, if proved, could not be recognized. 472
15. H. having purchased from D. "a claim on public land" for $50, and D. being indebted to P. in that amount due by open account, by mutual agreement between the three H. executed his note to P. "in payment of" D.'s indebtedness: *Held*, that this was a sufficient consideration to support an action on the note by P. or his assignee.—Hughes v. Young, 483
16. A contract made on Sunday, unless made under a necessity in order to prevent a threatened loss, is void (Clay's Digest, p. 582, § 1.)—Hooper v. Edwards, 528
17. In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable, precisely as a third person, if the loss or injury is caused by his neglect or want of care.—Perry v. Marsh, 659
18. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if it is known to him; and if he fails to make this disclosure, and the workman, while engaged in the service, thereby sustains an injury, the employer is responsible in damages. 659
19. A writing in these words: "Sir—At Mr. S.'s request, I have concluded to stand his security for the hire of two boys, not exceeding $210, for the year 1847. Dec. 31, 1846,"—held a collateral guaranty which required notice of acceptance within a reasonable time, there being no new consideration between the parties.—Fay v. Hall, 704

For SPECIFIC PERFORMANCE and RESCISSION OF CONTRACTS,
See CHANCERY, 9, 10, 12, 13, 14, 17, 18, 27.

COSTS.

1. Security for the costs of an appeal cannot be taken in the Supreme Court; if the security is not given in the primary court, the appeal will be dismissed.—Carey v. McDougald's Adm'r, 109
2. A suit commenced by a corporation, without first giving security for the costs, as required by section 2398 of the Code, will be dismissed on motion.—Ala. & Tenn. River R. R. Co. v. Harris, 232
3. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398 of the Code; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served. 232
4. Security for costs cannot be required upon proof of the non-residence of the nominal plaintiff who sues for the use of another person.—Lewis v. Lewis, 315
5. If the names of the sureties for the costs of the appeal are shown by the record, although not mentioned in the clerk's certificate, it is sufficient.—Hall & Wife v. Wallace, 438
6. The defendant in a writ of *ad quod damnum*, sued out by the lessee of the City Water Works of Mobile, can only be taxed with the costs of the appeal, and the attendance of witnesses; but if the court renders judgment against him for the costs of the whole proceeding, and he takes an appeal to the Supreme Court, the proper amendment will there be made at his costs.—Burden v. Stein, 456
7. When no *supersedeas* bond, nor security for the costs of the appeal, is given, the cause will be stricken from the docket on motion, although the clerk certifies that "no bond was required because all costs have been paid."—King & Owen v. McCann, 471
8. When the proceedings of the Commissioners' Court in the establishment of a road are removed by *certiorari* into the Circuit Court, and the commissioners brought *in invitum* before that tribunal, no costs are recoverable against them on a reversal of their judgment; but if they take an appeal from the Circuit to the Supreme Court, and give security for the costs as provided by the Code (§ 3041), they are responsible for the costs of the appeal if the judgment of the Circuit Court is affirmed.—Comm'rs' Court of Russell v. Tarver, 480
9. An error in the imposition of costs, being amendable in the primary court, will be amended in the Supreme Court at the cost of the appellant. 489
10. A bond for security for the costs of an appeal is not necessary: a simple acknowledgment in writing is sufficient, unless the appeal is intended to operate as a *supersedeas*.—Riddle v. Hanna, 484

COURT, CIRCUIT.

1. The Circuit Court, by virtue of its general and plenary jurisdiction, has power to supply a lost record.—Adkinson et al. v. Keel, use &c., 551

COURT, COMMISSIONERS'.

1. The hire of carriages, procured by the sheriff of Mobile, under the direction of the circuit judge, to convey the grand jurors to the county jail for the purpose of inspecting it, is no charge against the county, although the Commissioners' Court, for many years past, has been

COURT, COMMISSIONERS'—CONTINUED.

in the habit of allowing such items.—Van Eppes v. Comm'rs' Court of Mobile, 460

2. When the proceedings of the Commissioners' Court in the establishment of a road are removed by *certiorari* into the Circuit Court, and the commissioners brought *in invitum* before that tribunal, no costs are recoverable against them on a reversal of their judgment; but if they take an appeal from the Circuit to the Supreme Court, and give security for the costs as provided by the Code (§ 3041), they are responsible for the costs of the appeal if the judgment of the Circuit Court is affirmed.—Comm'rs' Court of Russell v. Tarver, 480

3. The record of the Commissioners' Court must affirmatively show the jurisdiction of the court over the proposed road; a designation by number of the section, township and range through which the road runs, is not sufficient to show that it is within the county. 480

COURT OF MOBILE, CITY.

1. The judge of the City Court of Mobile has power to take a bond conditioned that the principal obligor "make his personal appearance before the City Court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder."—Arnold v. The State, 69

COURT OF PROBATE.

See ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS.

COURT, SUPREME.

See APPEALS AND WRITS OF ERROR; BILLS OF EXCEPTIONS; PROHIBITION.

COURT AND JURY.

1. When there is the least conflict, in a material point, between the evidence adduced by the State and that offered by the defendant, a charge, based upon the State's evidence, and indicating that the jury may look to it alone in passing upon the guilt or innocence of the defendant, is improper; but if there is no conflict in the testimony, and the conclusion drawn by the court is the only one warranted by the facts and the law arising upon them, such a charge may be given. Dill v. The State, 15

2. The prisoner being indicted for mayhem of a slave, the evidence showed that he shot the slave in the leg, rendering its amputation necessary, and "that the shot seemed to go together, making a continuous wound"; the court charged the jury, "that, as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, *they might look to the character of the wound, for the purpose of determining whether he fired the gun with the view of striking and disabling the leg*": *Held*, that the charge was not erroneous.—Eskridge v. The State, 30

3. Whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of

COURT AND JURY—CONTINUED.

the jury upon the evidence; and a charge which assumes that such knowledge was brought home to him, is erroneous.—Elam v. State, 53

4. Section 2355 of the Code does not deprive the court of the right to give explanatory charges after having given the charge asked in writing; on the contrary, it is the duty of the court to simplify and explain the charge given, by such additional instructions as will prevent a misunderstanding or misapplication of it.—Morris v. The State, 57

5. An inference of fact can only be drawn by the jury; a charge, therefore, which assumes that a conversion is proved, when the evidence only establishes an intention to convert, is erroneous.—Knight's Adm'r v. Vardeman, 262

6. A person who is shown by parol to have been the real defendant in an action of detinue, though no party to the record, is concluded by the judgment as to the title then adjudicated, but not as to a title subsequently acquired from one who was neither a party nor privy to the action; but the jury must pass upon the sufficiency of the parol evidence, and it is error in the court to assume its sufficiency.—Tarleton & Pollard v. Johnson, 300

7. When a case is submitted to the decision of the judge, without the intervention of a jury, his judgment on the law of the case is revisable on appeal.—Shaw v. Beers, 449

8. A charge must be construed with reference to the proof.—Kirkland v. Oates, 465

9. When the charge of the court assumes a fact as proved, it will be presumed, on error or appeal, that the evidence justified the assumption, unless the bill of exceptions shows that the evidence was conflicting, or left the fact in doubt: a statement that the evidence "tended to show" the fact, is not sufficient to put the court in error. 465

10. When the evidence of a custom is conflicting, it should be left to the jury to determine whether the custom is proved; but where the only evidence is that of one witness, whose testimony, not restricting the custom to any particular time or place, tends to prove the law merchant to be otherwise than it really is, the court may instruct the jury that there is no evidence of custom before them.—Jewell v. Center & Co. 498

CRIMINAL LAW.

1. A slave's confessions of guilt to his master, when elicited or influenced by the fear of punishment or the hope of some benefit to be gained by making them, is not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation.—Wyatt v. The State, 9

2. Therefore, in this case, the slave's confessions to his master were excluded, because the latter had said to him, "Boy, these denials only make the matter worse;" and the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect. 9

CRIMINAL LAW—CONTINUED.

3. When there is the least conflict, in a material point, between the evidence adduced by the State and that offered by the defendant, a charge, based upon the State's evidence, and indicating that the jury may look to it alone in passing on the guilt or innocence of the defendant, is improper; but if there is no conflict in the testimony, and the conclusion drawn by the court is the only one warranted by the facts and the law arising upon them, such a charge may be given.—Dill v. The State, 15
4. If one see another about to perpetrate a felony, he may use such force to prevent it as may be necessary; and if, while so engaged, he is intentionally killed, it will be murder in the slayer. 15
5. As to reasonable apprehension of imminent danger to life or limb, when relied on as a defence. 15
6. The statutory offence of mayhem (Code, § 3105) may be committed on a slave.—Eskridge v. The State, 30
7. The fact that the defendant was intoxicated—"that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his declarations or confessions of guilt inadmissible. 30
8. When the indictment alleges that the slave who was maimed belonged to the defendant's wife, while the evidence shows that the defendant himself was the owner, the variance is fatal; the allegation of ownership, being a material part of the description of the slave, must be proved as laid, in order to identify the person on whom the offence was committed, thus enabling the defendant to prepare his defence, and making the record of his conviction or acquittal a protection against a second indictment for the same offence. 30
9. Although the master may use such means, and so much force, to any extent, as will be effectual to subdue his slave, yet he may not deprive the slave of life or limb, unless impelled to such an act by necessity. 30
10. The prisoner being indicted for mayhem of a slave, the evidence showed that he shot the slave in the leg, rendering its amputation necessary, and "that the shot seemed to go together, making a continuous wound;" the court charged the jury, "that, as there was no proof of the distance between the prisoner and the slave when the wound was inflicted, *they might look to the character of the wound, for the purpose of determining whether he fired the gun with the view of striking and disabling the leg*:" *Held*, that the charge was not erroneous. 30
11. An indictment (under the Code) for trading with a slave, is fatally defective, when the slave is described as "a slave, the property of Benajah S. Bibb, whose name is to the jury unknown."—Starr v. The State, 38
12. An indictment (under the Code) which charged that the defendants "before the finding of the indictment, assaulted and beat B B., against the peace and dignity of the State of Alabama," held sufficient, on the authority of Noles v. The State, 24 Ala.—Thompson v. The State, 41
13. Where several persons are jointly indicted for an assault and bat-

CRIMINAL LAW—CONTINUED.

tery, and one of them pleads guilty, the others, who plead not guilty, cannot claim, as a matter of right, to be tried separately from him. 41

14. A person who believes that his property has been stolen by a slave, has no right, without process of law, to search the slave's dwelling on the premises of his master. 41

15. Where several persons, without process of law, enter upon a man's premises, for the purpose of searching his negro houses for stolen property, and one of them commits an assault and battery on the owner, the others are not responsible for it, unless the assault was committed during the prosecution of their original unlawful purpose, or within such a time afterwards as to satisfy the jury that it was connected therewith; but if the evidence conduces to show that their original purpose not only extended to the search, but contemplated the use of force if opposed or interfered with on the premises, a charge is properly refused which assumes that the common design was limited to the search. 41

16. When application is made for a continuance on account of absent witnesses, the court, in the exercise of its discretion, may require the other party to admit the truth of the facts proposed to be proved by the absent witnesses, or, merely that those witnesses, if present, would swear to those facts; but an admission that the absent witnesses would swear to those facts, is not an admission of their absolute truth.—Starr v. The State, 49

17. Under an indictment for trading with a slave, it was shown that the defendant had bought some bricks from the slave, which the latter had stolen from his master; and the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises: *Held*, that the defendant's declarations (made while the witness was examining the bricks), "that the bricks were his, and that he got them from another person's brickyard," were not admissible evidence for him. 49

18. An indictment (under § 1059 of the Code), which charges that the defendant, before the finding of the indictment, "sold spirituous liquor, without a license, and contrary to law," is sufficient; and under it the defendant may be convicted, on proof, of selling to a person of known intemperate habits.—Elam v. The State, 53

19. Whether the defendant had knowledge of the intemperate habits of the person to whom he sold the liquor, should be left to the decision of the jury upon the evidence; and a charge which assumes that such knowledge was brought home to him, is erroneous. 53

20. An indictment (under the Code) for gaming charged, that the defendants "played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted:" *Held*, that the indictment was sufficient on demurrer, and was not violative of the tenth section of the first article of the State constitution.—Burdine v. The State, 60

21. A lawyer's office, during the session of the Circuit Court, is not a

CRIMINAL LAW—CONTINUED.

"public place" within the statute against gaming; the playing having taken place at night, by permission of the person who occupied the room as a sleeping apartment, when the doors were locked, and the curtains drawn over the windows. 60

22. When an offence is created and fully defined by statute, it is sufficient to charge it in an indictment in the words of the statute.—Lodano v. The State, 64

23. The useless repetition of words in an indictment does not vitiate it, but the superadded words may be rejected as surplusage. 64

24. The Legislature is not restricted by the State constitution from imposing such conditions as may be deemed proper and required by the good of the community, upon those who are allowed to retail spirituous liquors, both as regards the persons to whom and the quantities in which they may sell. 64

25. A free person of color, whose mother was an inhabitant of Mobile when the territory was ceded by Spain to the United States, is included in the act of 1852 (Pamphlet Acts 1851-2, p. 80), prohibiting the sale of spirituous liquors to free persons of color. 64

26. An indictment under the act of February 12, 1850 (Pamphlet Acts 1849-50, p. 49), which charges that the defendant sold spirituous liquor to a slave, "without the consent of the master, overseer, *or agent of such slave*," is fatally defective.—Agee v. The State, 67

27. The judge of the City Court of Mobile has power to take a bond conditioned that the principal obligor "make his personal appearance before the City Court, now in session, *instanter*, and from day to day during the term, and from term to term thereafter, to answer the State of Alabama on a charge of an assault to murder."—Arnold v. The State, 69

28. To support an indictment under section 3108 of the Code, the accusation must be the moving cause of the assault; if the assault was committed upon the provocation that the person assaulted had whipped the defendant's son, the defendant would be guilty of an assault and battery, but not of the statutory offence.—Underwood v. The State, 70

29. A physician's office is not a public place within the statute against gaming, when the playing is at night, with closed doors and curtained windows: although it is also shown that the room adjoined a merchant's counting room, with a door communicating between them, and that the person who occupied it as a sleeping room was in the habit of inviting his friends to come to his room for the purpose of playing.—Sherrod v. The State, 78

30. Trover for the conversion of a stolen slave cannot be maintained against the thief before the institution of a prosecution against him for the felony.—Martin v. Martin, 201

31. In proceedings had before a justice of the peace, preliminary to the issue of a warrant for a public offence, technical accuracy is not required: it is sufficient, if, giving to the language employed its usual and ordinary signification, it shows that an offence against the criminal law has been committed.—Crosby v Hawthorn, 221

32. An affidavit charging the affiant's belief that the defendant "*was*

CRIMINAL LAW—CONTINUED.

about to persuade, and trying to persuade, two of his (affiant's) *hired slaves to leave his premises,*" though informal, is substantially sufficient to justify a warrant against the defendant under the statute (Clay's Dig. p, 419, § 13,) fordidding any person to "*aid* any negro or other slave to run away or depart from his master's service." (Goldthwaite, J., *dissenting*.) 221

33. Although penal statutes are to be strictly construed, and cannot be extended by construction, yet they are not to be construed so strictly as to defeat the obvious intention of the Legislature. 221

CUSTOM.

1. Evidence of a particular usage to pay *pro rata* on a contract of hiring if the slave does not work the full term agreed on, cannot be received, since the usage, if proved, could not be recognized.—Petty v. Gayle, 472
2. When the evidence of a custom is conflicting, it should be left to the jury to determine whether the custom is proved; but where the only evidence is that of one witness, whose testimony, not restricting the custom to any particular time or place, tends to prove the law merchant to be otherwise than it really is, the court may instruct the jury that there is no evidence of custom before them.—Jewell v. Center & Co. 498
3. The law merchant cannot be proved by witnesses, but is matter of law for the court. 498
4. Evidence of a custom held to be so vague as to the length of time it had existed, and so general and indefinite as to the place of its existence, as not, *prima facie*, to enter into and form a part of the contract sued on, so as to control its provisions as a particular usage of trade. 498

DAMAGES.

1. The measure of damages for a breach of a warranty of title to a slave, which is afterwards recovered from the vendee in a suit of which the vendor had notice, is the value of the slave at the time of his purchase, with interest thereon, and the cost necessarily incurred by him in the suit brought against him to test the title, with interest thereon from the time of its payment.---Rowland's Adm'rs v. Shelton, 217
2. To entitle the plaintiff to a recovery against a railroad company under the act of 1852, it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by the defendant's cars or locomotives.—N. & Ch. R. R. Co. v. Peacock, 229
3. Whether any degree of care and diligence on the part of the defendant will excuse it, *quære?* 229
4. That the cattle were killed while roaming on lands which did not belong to their owner, is no defence to the action, as the doctrine of the common law in relation to *damage feasant* has never been adopted in this State. 229
5. In an action on a detinue bond, a recovery may be had (under a special allegation) for the value of the hire of the property during the whole time the defendant was deprived of its use, although, after

DAMAGES—CONTINUED.

he had failed to give the statutory bond, the property was delivered to the plaintiff upon his execution of a second bond for its forthcoming, as provided by the statute; and this value may be proved by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession."—Hudson v. Young, 376

6. The doctrine in relation to partial performance of mutual covenants which go to a part only of the consideration on both sides, where the part unperformed can be compensated in damages, (Boone v. Eyre, 1 H. Bla. 273, n. a,) has no application to the case of a penal bond for the payment of money on the performance of a condition precedent.---Rives v. Baptiste, 382

7. Unliquidated damages, sounding in tort, are not the subject of a set-off, either at law or in equity.---Pulliam v. Owen & Russell, 492

8. In ordinary cases, where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either; but where there is no danger in the work or service in itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer is liable, precisely as a third person, if the loss or injury is caused by his neglect or want of care.---Perry v. Marsh, 659

9. If one employs a workman in a service which is apparently safe, but which becomes hazardous from causes disconnected from the service, which are not discoverable by the exercise of ordinary prudence, he is bound, by the strongest principles of morality and good faith, to disclose the danger, if it is known to him; and if he fails to make this disclosure, and the workman, while engaged in the service, thereby sustains an injury, the employer is responsible in damages. 659

DEPOSITIONS.

1. When complainant has several times examined a defendant as a witness (once in chief and twice on cross-interrogatories) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time on the hearing.---De Vendal v. Malone's Executors, 272

2. A general motion to exclude a party's answers to interrogatories exhibited to him under the statute, "on the ground that they are evasive, irresponsive, and contain improper matter," when some of them are full and correctly made, should be overruled.—Swinney & Palmer v. Dorman, 433

DETINUE.

1. In detinue for a slave, a plea of a former judgment in favor of the defendant is nothing more, in effect, than that the title to the slave was in the defendant at a day certain before the commencement of the suit; it is, therefore, defective on demurrer.—Wittick v. Traun, 317

2. In detinue for several slaves, a judgment in favor of the plaintiff for

DETINUE—CONTINUED.

all of them except one, as to whom the judgment entry is silent, is a judgment in favor of the defendant for that one. 317

3. In an action on a detinue bond, a recovery may be had (under a special allegation) for the value of the hire of the property during the whole time the defendant was deprived of its use, although, after he had failed to give the statutory bond, the property was delivered to the plaintiff upon his execution of a second bond for its forthcoming, as provided by the statute; and this value may be proved by evidence of the "value of the use of the property per day, over and above expenses, during the time it was in the plaintiff's possession." Hudson v. Young, 376

ENTRY AND DETAINER—FORCIBLE AND UNLAWFUL.

1. An action for an unlawful detainer cannot be maintained, either under the general statute (Clay's Digest, p. 251) or under the special act applicable to Mobile (Pamph. Acts 1847-8, p. 99), against one who, "within three years last past, unlawfully entered upon and took possession of" premises then in the plaintiff's possession, "and has since unlawfully kept and detained the possession thereof from him:" this remedy only lies against a tenant who holds over after the expiration of his term, or against one who obtains or holds possession by, from, under, or by collusion with such tenant.—Russell v. Desplous, 314

2. In an action of unlawful detainer, where the defendant, having purchased the premises at sheriff's sale under execution against the plaintiff, received the possession from an under-tenant of plaintiff's lessee after the expiration of the original tenancy, the record of the judgment under which the land was sold, and the sheriff's deed for the premises, are not admissible evidence for the defendant, even "to show that his possession was lawful:" such evidence goes to the merits of the title, and is therefore inadmissible.—Clay's Digest 251, § 5; Code, § 2859.—Dumas v. Hunter, 711

ESTATES OF DECEASED PERSONS.

1. The surviving brothers and sisters of a deceased infant, may recover, in equity, a legacy bequeathed to them jointly with him, without administration on his estate, when there are no debts against it.—Vanzant v. Morris, 285

2. A decree rendered in the Probate Court on the final settlement of an estate, distributing the share of a deceased distributee directly among his children, held erroneous, and reversed on appeal sued out by his administrator, who had been made a party to the decree, on petition, for the purpose of taking an appeal.—McConico v. Cannon, 462

3. Under the Code (§ 1888) an appeal does not lie to the Supreme Court, on an order of the Probate Court for the sale of real estate belonging to a decedent.—Devany's Heirs v. Devany's Adm'rs, 722

ESTOPPELS.

1. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict, and therefore

ESTOPPELS—CONTINUED.

the judgment is conclusive that they were recovered; and the fact that the action was against a tenant whose term expired before the rendition of the judgment, if his landlord was made a party, makes no difference.—Shumake v. Nelms' Adm'r, 126

2. A recovery in ejectment, or in trespass to try titles, is conclusive between the parties and their privies, as to the title of the plaintiff's lessor, in a subsequent action for the rents and profits. 126

3. When two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the execution, is conclusive evidence that it is also subject in the other.—Derrett v. Alexander, 265

4. In trover for the conversion of several bales of cotton, the record of a former recovery in an action of detinue, brought by one who is shown to have been defendant's bailee,—which action defendant by his counsel defended, and in which, on an agreed statement of facts, his title was set up, and held subordinate to plaintiff's,—is admissible evidence for the plaintiff, and parol evidence is admissible, in aid of the record, to show defendant's connection with the case.—Tarleton & Pollard v. Johnson, 300

5. A person who is shown by parol to have been the real defendant in an action of detinue, though no party to the record, is concluded by the judgment as to the title then adjudicated, but not as to a title subsequently acquired from one who was neither a party nor privy to the action; but the jury must pass upon the sufficiency of the parol evidence, and it is error in the court to assume its sufficiency. 300

6. A judgment, when rendered on a verdict on the merits, is final and conclusive between the parties, not only as to the facts actually litigated and decided, but upon all the facts necessarily involved in the issue.—Wittick v. Traun, 317

7. The trustee is not estopped from showing that the actual amount of any debt is less than that specified in the assignment, and he would only be accountable for the actual amount of it.—Royall's Adm'r v. McKenzie, 363

8. Where one assumes to act in a particular capacity, he will be estopped from denying the position which he has taken, when such a denial would operate to defeat rights attaching to the contract itself; but the doctrine of estoppel does not extend to matters affecting the remedy merely, which are entirely foreign to and disconnected from the contract, or the character in which the parties entered into it:—Duncan & Hooper v. Stewart, 408

9. A slave's confession, made in the presence of his master and the plaintiff, that he has received from another slave stolen money belonging to plaintiff, involves no charge against his master, and calls for no reply from him; and therefore the master's silence cannot be construed into an admission on his part of any of the facts to which the confession related.—Jelks v. McRae, 440

10. The doctrine of estoppel *in pais* cannot be so extended as to allow a recovery on a promise of the master to pay stolen money received by his slave, which created no legal obligation for want of a consid-

ESTOPPELS—CONTINUED.

eration) merely because the plaintiff relied upon the promise, and therefore neglected to use proper means to recover his money. 440

11. If the president of a foreign bank is required by its charter to be a resident of the State in which it is located, he cannot, when sued by its creditors here, be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold that office by reason of his residence in this State.—Bank of St. Marys, Winter, et al. v. St. John, Powers & Co., and Henley, 566

ESTRAYS.

1. A person who kills an estray within twelve months after the straying, and appropriates it to his own use, is liable to the penalty given by the statute (Clay's Digest, p. 550, § 5) against "any person who shall take up or use an estray contrary to the meaning of the act.—Simpson v. Talbot, 469

2. When time is laid under a *videlicet*, the pleader is not required to prove it as alleged; and therefore, when the time of killing an estray is thus laid, although the time specified is within twelve months after the alleged straying, it is not a sufficient averment that it was within the twelve months. 469

EVIDENCE.

1. A slave's confessions of guilt to his master, when elicited or influenced by the fear of punishment or the hope of some benefit to be gained by making them, is not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation.—Wyatt v. The State, 9

2. Therefore, in this case, the slave's confessions to his master were excluded, because the latter had said to him, "Boy, these denials only make the matter worse;" and the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect. 9

3. No precise rule can be laid down as to the length or character of acquaintance which would render the opinion of a person not a physician admissible evidence on a question of insanity. In cases of general insanity—a total incapacity to distinguish right from wrong on any question—the same degree of observation is not required to discover the existence of the disease, as in cases of monomania or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case, the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. (In this case the opinion of the witnesses, in connection with the facts to which they deposed, was ruled admissible.)—Powell v. The State, 21

EVIDENCE—CONTINUED.

4. The fact that the defendant was intoxicated—"that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his declarations or confessions of guilt inadmissible.—Eskridge v. The State, 30
5. Under an indictment for trading with a slave, it was shown that the defendant had bought some bricks from the slave, which the latter had stolen from his master, and the master testified, on behalf of the State, that the bricks were his, and that he had examined them on the defendant's premises: *Held*, that the defendant's declarations (made while the witness was examining the bricks), "that the bricks were his, and that he got them from another person's brick-yard," were not admissible evidence for him.—Starr v. The State, 49
6. To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient.—Elam v. The State, 53
7. The fact of insolvency cannot be proved by hearsay evidence.—Walker v. Forbes, 139
8. The statement of the principal debtor, made during the pendency of the negotiation for the goods, "that he had been unfortunate and was without means," is admissible evidence against the guarantor, in a suit on the guaranty, as tending to show that the credit was given to him. 139
9. A witness may testify to the existence of notes or bills of exchange, although they are not produced, nor their absence accounted for.—Snodgrass v. Branch Bank at Decatur, 161
10. So, also, he may testify to the fact that a debtor made a written proposition of compromise, without producing the writing, or accounting for its absence. 161
11. On a trial of the right of property in slaves, the claimant derived title under a bill of sale from the defendant in execution, which the plaintiff attacked for fraud; and it was shown that the slaves had remained in the claimant's possession for about four years from the date of the bill of sale: *Held*, that the plaintiff might prove that the defendant in execution was decreed a bankrupt at the expiration of that time, and that the slaves were found in his possession a few months afterwards. 161
12. The record of a judgment rendered against the defendant in execution after his sale to the claimant, is not admissible evidence, as against the claimant, to prove an indebtedness prior to its rendition. 161
13. In trover for the conversion of a slave, which the evidence tended to prove had been stolen by the defendant, plaintiff having introduced evidence to show that defendant and his accomplice, by whom the slave was run off, "were quite intimate and friendly, and acted in concert:" *Held*, that defendant might rebut this evidence by proving that his alleged accomplice "manifested great hostility to him."—Martin's Executrix v. Martin, 201
14. A person who removed into the neighborhood of an impeached wit-

EVIDENCE—CONTINUED.

ness, about the time the latter left, is competent to testify to his general reputation in that neighborhood at that time. 201

15. A witness may testify to the general character of an impeached witness for truth and veracity, both from his own knowledge and from what he has heard from other persons; and he may state that it is "very unfavorable." 201

16. The contents of an attachment, which is shown to be lost, may be proved by secondary evidence.—Derrett v. Alexander, 265

17. Evidence of the death of an animal attached, before the trial of the claim suit, is inadmissible, as it does not affect the right of recovery. 265

18. In trover for the conversion of several bales of cotton, the record of a former recovery in an action of detinue, brought by one who is shown to have been defendant's bailee,—which action defendant by his counsel defended, and in which, on an agreed statement of facts, his title was set up and held subordinate to plaintiff's,—is admissible evidence for the plaintiff, and parol evidence is admissible, in aid of the record, to show defendant's connection with the case.—Tarleton & Pollard v. Johnson, 300

19. When a witness testifies, on his *voir dire*, that he was a partner of the firm which is shown by other evidence to have been defendant's vendor of the goods in suit, he may testify to the further fact that said firm was also the plaintiff's vendor, thus balancing his interest, and restoring his competency. 300

20. An answer in chancery is admissible evidence against the respondent, in a subsequent suit, whether the parties are the same or not.—Royall's Adm'r v. McKenzie, 363

21. A witness may state that "he regards certain debtors as insolvent," if his testimony shows that his conclusion is based upon his knowledge of their circumstances; but not otherwise. 363

22. The declarations of one who is in possession of personal property, in disparagement of his own title, are admissible evidence against a subsequent derivative purchaser from him.—Jennings v. Blocker, 415

23. A recital in a will made by the donor at the time of the gift to his daughter, though of no efficiency as a muniment of title, is relevant testimony as tending to show the gift, and is admissible as part of the *res gestæ*. 415

24. On the taking of an account before a master in chancery, to ascertain the compensation to which an executor is entitled, a witness cannot be asked, after the pleadings and depositions in the cause have been read in his hearing, "to state, from his own knowledge, and the facts disclosed by the pleadings and evidence, what would be a reasonable compensation to the executor."—Gould v. Hays, 426

25. A general motion to exclude a party's answers to interrogatories exhibited to him under the statute, "on the ground that they are evasive, irresponsive, and contain improper matter," when some of them are full and correctly made, should be overruled.—Swinney & Palmer v. Dorman, 433

26. A slave's confession, made in the presence of his master and the plaintiff, that he has received from another slave stolen money belonging

EVIDENCE—CONTINUED.

to the plaintiff, involves no charge against his master, and calls for no reply from him; and therefore the master's silence cannot be construed into an admission on his part of any of the facts to which the confession related.—Jelks v. McRae, 440

27. When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and it does not lie with him to say that any portion of it is illegal or incompetent.—Jewell v. Center & Co., 498

28. When the evidence of a custom is conflicting, it should be left to the jury to determine whether the custom is proved; but where the only evidence is that of one witness, whose testimony, not restricting the custom to any particular time or place, tends to prove the law merchant to be otherwise than it really is, the court may instruct the jury that there is no evidence of custom before them. 498

29. The law merchant cannot be proved by witnesses, but is matter of law for the court. 498

30. Evidence of a custom held to be so vague as to the length of time it had existed, and so general and indefinite as to the place of its existence, as not, *prima facie*, to enter into and form a part of the contract sued on, so as to control its provisions as a particular usage of trade. 498

31. The non-production by a witness of a letter spoken of by him, which he is required by the interrogatory to attach to his answer, does not justify any inference prejudicial to the party by whom his deposition was taken; its non-production after notice would only justify parol proof of its contents. 498

32. Although the donor's subsequent declarations cannot be received to invalidate his previous gift, when once it is established; yet, where the issue is whether he had parted with his dominion in favor of the donee, with whom he had left the slave, a letter subsequently written by him to the latter is admissible evidence for the purpose of showing that the latter was holding as his bailee merely.—Stallings v. Finch, 518

33. But evidence that the slave was the kept mistress of her owner, and that she had children by him, is irrelevant and inadmissible for the plaintiff. 518

34. In an action by an auctioneer against the purchaser of a slave, to recover the difference between the price bid at the sale and the amount brought at a re-sale on the purchaser's account, a written memorandum of the sale kept by plaintiff's clerk who was present,—accompanied by the parol testimony of the clerk, showing that the slave was knocked down to defendant, and was afterwards delivered to him,—is admissible evidence for plaintiff, as proving such a consummation of the sale as will take it out of the statute of frauds. Kelly v. Brooks, 523

35. Evidence of a proposition of compromise or arbitration, and its refusal, is not admissible evidence against the party refusing. 523

36. If a party introduces and examines in chief a witness who has an interest adverse to him, he thereby waives all objection to his incompetency from interest, and confers on his adversary the right to

EVIDENCE—CONTINUED.

examine the witness fully as to his knowledge touching any and all facts material to the case. 523.

37. What is said by the parties to a contract at the time it is made, as to its terms, is admissible evidence as a part of the *res gestæ*.—Hooper v. Edwards, 528

38. What is said by the parties at the time slaves are delivered under a contract of hiring previously made, in relation to the contract, is also admissible on the same principle. 528

39. A transcript from the books or papers on file in the General Land Office, or in the Indian Bureau of the Department of the Interior, if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence.—Stephens v. Westwood, 716

EXCEPTIONS, BILL OF.

1. In a case in which insanity was relied on as a defence to an indictment for larceny, the bill of exceptions recited that the State offered to prove, by a witness who had known the prisoner two years before the commission of the alleged offence, "that the prisoner, in his opinion, was a man of sound mind and not insane, and that he could distinguish right from wrong; to which the prisoner objected": *Held*, construing the bill of exceptions most strongly against the exceptor, that the opinion of the witness referred to the prisoner's mental condition at the time of his previous acquaintance with him, and not at the time of the trial.—Powell v. The State, 21

2. The party who insists on error must make the record affirmatively show it.—Eskridge v. The State, 30

3. When an affirmative charge is given, which asserts a correct abstract proposition of law, it will be presumed, on error or appeal, to have been justified by the evidence, unless the proof is set out in the bill of exceptions.—Morris v. The State, 57

4. When a party excepts to the refusal of the court to give a charge asked, he must set out in his bill of exceptions sufficient of the evidence to show that the charge was not abstract. 57

5. When the bill of exceptions, after setting out a charge requested by the defendant, concludes with these words: "which charge the court refused, and *the defendant excepted*," the exception applies only to the refusal to charge, and cannot be extended to charges previously given.—Agee & Agee v. Medlock, 281

6. Plaintiffs in attachment having assigned for error the several rulings of the court shown by the bill of exceptions in the admission and exclusion of evidence on the trial, while the judgment entry (only reciting that the garnishee answered orally denying all indebtedness to the defendant in attachment, and that it was therefore ordered by the court that he be discharged) excluded the idea that there was any trial, or that the garnishee's answer was even controverted, the *judgment was affirmed, and the rulings of the court set out in the bill of exceptions were not considered.*—Marriott & Hardesty v. Lewis, 332

7. When the charge of the court assumes a fact as proved, it will be presumed, on error or appeal, that the evidence justified the assumption,

EXCEPTIONS, BILLS OF—CONTINUED.

unless the bill of exceptions shows that the evidence was conflicting, or left the fact in doubt: a statement that the evidence "tended to show" the fact, is not sufficient to put the court in error.—Kirkland v. Oates, 465

8. Under the act "to regulate the sessions of the Circuit and City Courts of Mobile," (which provides—Pamph. Acts 1853-4, p. 92, § 8—that execution shall issue at the expiration of twenty days from the rendition of any judgment, and "that the said judgment shall be final, in every respect the same as if the minutes of the court had been signed, and the court adjourned; but the defendant shall not be thereby prevented from moving for a new trial, or in arrest of judgment, nor deprived of any right he would otherwise have had,") a bill of exceptions, which is not reduced to writing and presented to the judge for signature until after the expiration of twenty days from the rendition of the judgment, will be regarded as not presented until after the adjournment of the court.—Stein v. McArdle & Waters, 561

9. A bill of exceptions, which was not reduced to writing and presented to the judge for signature within the time prescribed by the statute, cannot be established (Code, § 2356) upon proof that the cause, which involved less than $20, was submitted to the judge without the intervention of a jury, and was held under advisement by him,—that the counsel of the party excepting frequently applied to him to know whether he had decided it, and was told by him that he had not; and that a judgment was afterwards rendered by him without notifying the counsel, although they were in daily attendance on court, of which they had no notice whatever until after the expiration of the time prescribed for signing bills of exceptions. 561

10. Where the claimant's bill of exceptions shows an erroneous affirmative charge against him, the objection cannot be raised, to prevent a reversal in his favor, that the bill of exceptions purports to set out all the evidence in the cause, and does not show that the claimant proved the consideration of his deed from the defendant, although it was executed after the rendition of plaintiff's judgment: that point cannot be raised in the appellate court, when no objection was made to the reading of the deed in the court below, and no charge asked in reference to the effect of this deficiency of proof upon the rights of the parties.—Cotten v. Thompson, 671

EXECUTION, WRIT OF.

1. When the wife is seized in fee simple of lands at the time of her marriage, her husband, by virtue of the marriage, takes at least an estate for life, which is a legal freehold subject to levy and sale under execution at law against him.—Cheek v. Waldrum and Wife, 152

2. If the sheriff pays to the plaintiff the amount of an execution then in force in his deputy's hands, and the deputy afterwards collects it from the defendant in execution, his sureties are liable on their bond if he fails to account for it, as no one but the defendant in execution can take advantage of the payment by the sheriff.--McGehee v. Gewin, 176

3. The discharge of a levy, on account of the plaintiff's failure to give a bond of indemnity when required by the sheriff, destroys the lien

EXECUTION, WRIT OF—CONTINUED.

on the property, and thus gives effect, as against a subsequent levy, to a deed executed by the defendant while the execution was in the sheriff's hands, but before it was levied.—Cotten v. Thompson, 671

EXECUTORS AND ADMINISTRATORS.

1. When an administrator refuses to plead the statute of limitations, the distributees of the estate cannot, on motion, be made parties to the cause for the purpose of putting in that plea.—*Ex parte* Perryman and Wife, 79
2. On final settlement of an administrator's accounts, he was held entitled to a credit for the entire amount paid by him on a note, (which was shown to have been executed for the benefit of one K., by the intestate, said K. and himself, as joint makers,) on proof of the intestate's repeated declarations "that there were matters between him and K., in relation to the note, of which R. (the administrator) knew nothing, and which made it his (intestate's) duty to protect R," although there was also evidence of his own declarations that he had signed the note as co-surety with his intestate, and considered himself equally bound for its payment.—Milam v. Ragland, 243
3. An administrator in chief, on settlement of his accounts with the succeeding administrator *de bonis non*, cannot be charged with a sum of money which is shown to have been deposited by the intestate, a short time before his death, in the hands of a bailee for safe-keeping, and to have been paid over by the bailee to the administrator *de bonis non* himself. 243
4. If one in his lifetime makes a fraudulent conveyance of his property, his grantee may, after his death, be charged as executor *de son tort*, although there is a lawful representative, because the latter, being bound by the fraud of his testator or intestate, cannot be charged at all in his representative capacity; but this doctrine has no application to cases of collusion between the lawful representative and a third person, where there is nothing to prevent the former from being held liable, and therefore the latter cannot be charged as executor *de son tort*.—Simonton v. McLane's Adm'r, 353
5. A grant of letters of administration on the estate of a living man, who is supposed to be dead, is absolutely void; and if the administrator sells the personal property, under an order of court regularly made, he is a trespasser.—Duncan & Hooper v. Stewart, 408
6. But the purchaser of a slave at the sale cannot, while holding possession under the contract, or if the slave has died while thus in his possession, resist the payment of the note given for the price, if sued by the administrator; and if, on the re-appearance of the supposed decedent, the administrator assigns the note to him by endorsement, the assignee may sue on it in his own name, and recover, notwithstanding the death of the slave prior to the endorsement. 408
7. Compensation, when applied to trustees, means but little (if anything) more than a liberal indemnity. As a general rule, in making allowances to executors, whether under the act of 1841, or without reference to that act, the court should look to the loss of time, trouble, risk and responsibility which are demanded by the nature of

EXECUTORS AND ADMINISTRATORS—CONTINUED.

the trust, and actually incurred, and allow such a remuneration as a prudent and just man would, under such circumstances, consider a fair compensation, without, however, being governed by the business charges usually made for the like services.--Gould v. Hays, 426

8. When letters of administration are granted to a sheriff *virtute officii*, and after his removal from the State *ex parte* proceedings are instituted against him to compel a settlement of his administration, all the preliminary orders of the court must show that he was proceeded against in that capacity; especially when it is shown that, after the expiration of his term of office as sheriff, he took out letters of administration individually, and gave a new bond with new sureties. Spence v. Savery, 723

9. The objection may be raised for the first time on error assigned by the defendant, that the preliminary proceedings, in which he is described as "administrator *de bonis non*," are not sufficient to support a final decree, by default, against him as "late sheriff of said county, and *by virtue of his office as sheriff administrator de bonis non*," &c. 723

10. And the fact that the estate had been previously declared insolvent on the report of the defendant, will not prevent him from raising the objection, when the record shows that the estate was not otherwise treated as insolvent, and the final decree against him is in favor of a succeeding administrator *de bonis non*. 723

FRAUDS, STATUTE OF.

1. The possession of slaves by a fraudulent vendee gives him no title under the statute of limitations, as against a creditor of the vendor, if the latter could not, by reasonable diligence, have discovered the fraud within six years before the levy of his execution.—Snodgrass v. Br. Bank at Decatur, 161

2. If one in his lifetime makes a fraudulent conveyance of his property, his grantee may, after his death, be charged as executor *de son tort*, although there is a lawful representative, because the latter, being bound by the fraud of his testator or intestate, cannot be charged at all in his representative capacity; but this doctrine has no application to cases of collusion between the lawful representative and a third person, where there is nothing to prevent the former from being held liable, and therefore the latter cannot be charged as executor *de son tort*.--Simonton v. McLane's Adm'r, 353

3. In an action by an auctioneer against the purchaser of a slave, to recover the difference between the price bid at the sale and the amount brought at a re-sale on the purchaser's account, a written memorandum of the sale, kept by plaintiff's clerk who was present,—accompanied by the parol testimony of the clerk, showing that the slave was knocked down to defendant, and was afterwards delivered to him,—is admissible evidence for plaintiff, as proving such a consummation of the sale as will take it out of the statute of frauds. Kelly v. Brooks, 523

4. If the purchaser of a slave at public auction takes possession under his contract, without anything being said, or any understanding

FRAUDS, STATUTE OF—CONTINUED.

had, qualifying the act, and retains possession for one, two or three days, without making any objection to the sale, the jury may well infer from these facts a consummation of the contract which is sufficient take it out of the statute of frauds. 523

GAMING.

See CRIMINAL LAW, 20, 21, 29.

GIFT.

1. A separate estate in slaves may be created by a verbal gift to a married woman consummated by delivery; and the donor cannot, by deed subsequently made without the consent of the donee, and while the latter is in possession, alter the terms of the gift.—Crabb's Adm'r v. Thomas, 212
2. The owner of a slave having left her in plaintiff's possession,—telling him that, if he never called for her, plaintiff's wife was to have her,—afterwards died without calling for her, and made no disposition of her by his will: *Held*, that these facts were not sufficient to establish a gift, as the owner had never parted with his control or right of dominion.—Stallings v. Finch, 518
3. Although the donor's subsequent declarations cannot be received to invalidate his previous gift, when once it is established; yet, where the issue is whether he had parted with his dominion in favor of the donee, with whom he had left the slave, a letter subsequently written by him to the latter is admissible evidence for the purpose of showing that the latter was holding as his bailee merely. 518
4. But evidence that the slave was the kept mistress of her owner, and that she had children by him, is irrelevant and inadmissible for the plaintiff. 518

GUARANTY.

1. A guaranty, addressed to a mercantile firm, in these words: "Gentlemen, if you can sell Mr. C. any groceries, I am willing to guaranty the ultimate payment of any bill he may make with you, to the amount of $500," is a collateral undertaking to be ultimately responsible for the demand, if the party to whom the groceries are furnished, after the use of all reasonable and proper means of coercing payment, fails to pay: and notice of acceptance, as also of the principal's default, is necessary to charge the guarantor.—Walker v. Forbes, 139
2. Notice of acceptance within a reasonable time must be given to the guarantor, except in cases where the agreement to accept is contemporaneous with the guaranty, or constitutes the consideration and basis of it. 139
3. Where the guaranty is of a demand to be created in future, and the terms of the contract are left at the option of the guarantee and the principal debtor, the guarantor is entitled to notice of the principal's default; but if the latter is insolvent when the debt falls due, notice is unnecessary, as the guarantor can sustain no injury from the want of it. 139

GUARANTY—CONTINUED.

4. In assumpsit on a collateral guaranty, in such case, no recovery can be had on the common counts; and a special count, which does not set out the terms of the contract between the guarantee and the principal debtor, is fatally defective on demurrer. 139
5. Sureties, endorsers and guarantors are liable according to the law of the place of their contract. 139
6. Sections 3014, 3015 and 3016 of the Civil Code of Louisiana apply to ordinary contracts of suretyship, or simply guaranties, but not to cases where the terms of the contract expressly provide or necessarily imply a diligence on the part of the creditor beyond that required by them. 139
7. A draft drawn by the principal debtor on the guarantor for the amount of the debt, but not accepted by the latter, does not in any way affect the relations of the parties on the original demand, when it does not appear to have been received in payment. 139
8. The statement of the principal debtor, made during the pendency of the negotiation for the goods, "that he had been unfortunate and was without means," is admissible evidence against the guarantor, in a suit on the guaranty, as tending to show that the credit was given to him. 139
9. A writing in these words: "Sir—At Mr. S.'s request, I have concluded to stand his security for the hire of two boys, not exceeding $210, for the year 1847. Dec. 31, 1846,"—held a collateral guaranty which required notice of acceptance within a reasonable time, there being no new consideration between the parties.—Fay v. Hall, 704
10. In an action on a guaranty, where notice of acceptance is necessary to charge the guarantor, notice must be averred in the declaration; but the general allegation ("of all which aforesaid premises the said defendant," &c., "then and there had notice"), when the declaration states facts on which it can operate, is sufficient. 704
11. The declaration must also aver the terms of the credit given to the principal debtor, and his failure to pay. 704

HUSBAND AND WIFE.

1. A married woman may come into equity, suing by her next friend, to protect her separate property from levy and sale under executions against her husband, if her trustee refuses to interpose a claim at law. Bridges & Co. v. Phillips, 136
2. Where slaves are partly purchased and paid for with the money of the husband, and a bill of sale taken to himself as trustee of his wife, he has such an interest in them as may be subjected to the payment of his debts; but his creditors must file a bill for this purpose, to ascertain and separate his interest from that of his wife. 136
3. When the wife is seized in fee simple of lands at the time of her marriage, her husband, by virtue of the marriage, takes at least an estate for life, which is a legal freehold subject to levy and sale under execution at law against him.—Cheek v. Waldrum and Wife, 152
4. When a mortgagor conveys mortgaged lands by an absolute conveyance, the estate of the purchaser is liable to be divested by a sale under the mortgage; and if the lands are subsequently sold under the mortgage, his widow is not entitled to dower in them. 152

HUSBAND AND WIFE—CONTINUED.

5. An ante-nuptial contract, which was drawn by the husband himself, and which, through his fraud or mistake, does not include all the property which was intended to be secured to the separate use of the wife, will be reformed in equity on her application.—Love v. Graham, 187
6. A married woman, whose trustee refuses to interpose a claim at law to protect her separate estate when taken in attachment by her husband's creditors, may come into equity for relief. 187
7. As to slaves which are shown to have been purchased by the husband with his own means, although the bill of sale was taken in the name of his father as trustee for his wife, the injunction will be dissolved, and the creditor allowed to proceed at law; but as to others which are shown to have been partly purchased with choses in action belonging to the wife's separate estate, the injunction will be perpetuated, without prejudice to the creditor's right to file a bill to separate the interest of the husband from that of the wife. 187
8. If a woman marry before the expiration of the term for which her slaves are hired out, the hire for the unexpired portion of the term, though included in the notes taken, is a part of the income (and not the *corpus*) of her estate, and therefore her husband is not accountable for it under the act of 1848.—Bryan and Wife v. Weems, ex'r &c., 195
9. If the wife dies intestate as to a portion of her estate only, her husband is entitled, under the acts of 1848 and 1850, to one half of the personal property undisposed of. 195
10. On a final settlement by the husband of his administration on his wife's estate, he is entitled to a credit for payments made by him during the marriage of debts contracted by her while sole which constituted a charge on her separate estate. 195
11. A separate estate in slaves may be created by a verbal gift to a married woman consummated by delivery; and the donor cannot, by deed subsequently made without the consent of the donee, and while the latter is in possession, alter the terms of the gift.—Crabb's Adm'r v. Thomas, 212
12. A married woman, whose separate estate is levied on by her donor's creditors, and who has no trustee to protect her interest at law, may come into equity for relief. 212
13. When slaves go into the possession of husband and wife, under a verbal gift from the wife's father to her sole and separate use, if the husband elects to treat them as her sole property, and holds and controls them as her trustee until her death, his marital rights cannot afterwards be asserted, but the property vests absolutely in the wife's personal representative.—Jenning's v. Blocker's Adm'r, 415
14. And if the husband afterwards places the slaves, as a nurse for his infant child, in the family of the donor, who subsequently executes a mortgage on them, which mortgage is purchased by one who is cognizant of all the facts, and who afterwards, without foreclosure, sells by quit-claim to another, the wife's administrator may recover against such derivative purchaser. 415
15. To charge the separate estate of a married woman, under the act of 1850 (Pamph. Acts 1849-50, p. 65), with "articles of family supply," the declaration must allege that she holds her separate estate either

HUSBAND AND WIFE—CONTINUED.
under the act of 1850, or that of 1848, to which it is an amendment: an averment, that she has a separate estate "which came to her after the first day of March, 1848," is not sufficient.—Cunningham v. Fontaine, 644
16. If the husband dies before suit brought, the right of action survives against the wife, for articles of family supply, under the act of 1850. 644

INDIAN RESERVATIONS.
1. After the location of an Indian reservee under the treaty of March 24, 1832, no valid entry of the land embraced in the reservation could be made; and consequently, a patent issued on such invalid entry, as against the reservee or those claiming under him, would be void.—Stephens v. Westwood, 716
2. If the location is proved by the Government records to have been regularly made, it cannot be collaterally impeached, even by one holding a patent from the United States. 716

INDICTMENT—See CRIMINAL LAW.

INSANITY.
1. No precise rule can be laid down as to the length or character of acquaintance which would render the opinion of a person not a physician admissible evidence on a question of insanity. In cases of general insanity—a total incapacity to distinguish right from wrong on any question—the same degree of observation is not required to discover the existence of the disease, as in cases of monomania or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case, the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or non-existence of the disease, considered with reference to the character or degree in which it is alleged to exist. (In this case the opinion of the witnesses, in connection with the facts to which they deposed, was ruled admissible.)—Powell v. The State, 21

INSOLVENT ESTATES.
1. A claim allowed against an insolvent estate for money paid by mistake, under these facts: The creditor, as administrator of the estate of the decedent's father, paid to the decedent's trustee (she being then a married woman) the distributive share of one of her brothers, which was supposed by all the parties to have been assigned to her husband for her separate use, and was afterwards compelled to pay it again to her husband's administrator, upon proof that the assignment was to the husband in his own right, and not for the separate use of his wife. Bird v. Bohannon's Adm'r, 279
2. A void execution having been levied on the defendant's goods after his death, the sheriff sold them, and paid over the proceeds to the plaintiff in execution, and afterwards, by virtue of his office as sheriff, became administrator *de bonis non* of the defendant's estate, which was declared insolvent: *Held*, that he was chargeable, on final settlement with the creditors, with the amount for which the goods sold.—Whitlock's Adm'r v. Whitlock's Creditors, 543

INSURANCE.

1. When a policy of insurance is assigned after a loss has accrued, the assignee may maintain an action on it in his own name, either under the act of 1828 (Clay's Digest, p. 383), or under the Code (§ 2129), although it contains the usual stipulation against assignment.—Perry v. Merchants' Insurance Company, 355
2. The assignee's right to sue is not affected by a stipulation in the policy for its renewal, if it had expired without renewal before the assignment, and the right of renewal was gone with the partial destruction of the property. 355
3. An assignment of "all the loss or damage which accrued under the policy prior to" a specified day, passes the whole interest in the policy to the assignee, when it is shown that the loss had accrued, and the policy expired, before that day. 355

INTEREST.

1. The law attaches interest as an incident to a debt from the moment it is due, unless there is some agreement between the parties to the contrary; the fact that the vendor acted in bad faith, and attempted to repudiate his contract altogether, does not relieve the vendee from the payment of interest, on a bill filed to enforce a vendor's lien.—Cheek v. Waldrum and Wife, 152
2. When a bill in equity is filed to compel a settlement and account of an assignment, consisting principally of notes and accounts under twenty dollars against debtors who were residents of the district in which the trustee lived, the trustee, in the absence of all special cause, should be allowed twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time.—Royall's Adm'r v. McKenzie, 363
3. The trustee's own note, when included in the assignment, should be charged as cash in his hands from the time it falls due. 363
4. Where the assignor, after the lapse of a sufficient time for closing the assignment, agrees with the trustee that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. 363

JUDGMENTS AND DECREES.

1. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict, and therefore the judgment is conclusive that they were recovered; and the fact that the action was against a tenant whose term expired before the rendition of the judgment, if his landlord was made a party, makes no difference.—Shumake v. Nelms' Adm'r, 126
2. A recovery in ejectment, or in trespass to try titles, is conclusive between the parties and their privies, as to the title of the plaintiff's lessor, in a subsequent action for the rents and profits. 126
3. The record of a judgment rendered against the defendant in execution after his sale to the claimant, is not admissible evidence, as against

JUDGMENTS AND DECREES—CONTINUED.

the claimant, to prove an indebtedness prior to its rendition.—Snodgrass v. Branch Bank at Decatur, 161

4. A decision of the Supreme Court is conclusive when the case in which it was rendered is brought back a second time on appeal.—Bryan and Wife v. Weems, ex'r &c., 195

5. When two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the execution, is conclusive evidence that it is also subject in the other.—Derrett v. Alexander, 265

6. In trover for the conversion of several bales of cotton, the record of a former recovery in an action of detinue, brought by one who is shown to have been defendant's bailee,—which action defendant by his counsel defended, and in which, on an agreed statement of facts, his title was set up, and held subordinate to plaintiff's,—is admissible evidence for the plaintiff, and parol evidence is admissible, in aid of the record, to show defendant's connection with the case.—Tarleton & Pollard v. Johnson, 300

7. A person who is shown by parol to have been the real defendant in an action of detinue, though no party to the record, is concluded by the judgment as to the title then adjudicated, but not as to a title subsequently acquired from one who was neither a party nor privy to the action; but the jury must pass upon the sufficiency of the parol evidence, and it is error in the court to assume its sufficiency. 300

8. An entry on the judge's docket, in the hand-writing of the presiding judge, reciting that the plaintiff was ruled to give security for costs by the next term, is not sufficient to authorize the entry of an order to that effect *nunc pro tunc* at a subsequent term, unless it shows the reason why the order was made.—Lewis v. Lewis, 315

9. A judgment, when rendered on a verdict on the merits, is final and conclusive between the parties, not only as to the facts actually litigated and decided, but upon all the facts necessarily involved in the issue.—Wittick v. Traun, 317

10, In detinue for several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment entry is entirely silent, is a judgment in favor of the defendant for that one. 317

11. A recovery in an action for the hire of a horse, buggy and harness, is not a bar to another action to recover damages for injuries done to the buggy and harness while in the possession of the bailee.—Shaw v. Beers, 449

12. The improper exercise by the chancellor of his power to appoint a guardian *ad litem* for an infant defendant in his court, may be reviewed on error, but the act itself is not void; and the decree rendered cannot be collaterally attacked by the infant for want of jurisdiction, although the appointment was made without service of process.—Preston v. Dunn, 507

13. When an infant defendant to a bill of revivor is described as the deceased defendant's "only infant son whose name is unknown," the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached; especially when the infant, by

JUDGMENTS AND DECREES—CONTINUED.

his subsequent bill to redeem lands sold under the decree, shows that he is the person against whom the bill of revivor was filed. 507

14. A judgment by default, against a defendant who was not before the court, purporting to be founded on an original attachment, which nowhere appears in the record, but which was prayed for and obtained (if at all) by the person for whose use, in the name of another as nominal plaintiff, the judgment was rendered,—is wholly irregular and erroneous, and cannot be aided by any intendments. —Kennedy v. Millsap, use &c., 560

JUDICIAL SALES.

1. The maxim "*caveat emptor*," as applicable to sheriffs' sales, holds as well in equity as at law.—Lang's Heirs v. Waring, 625
2. If the plaintiff in execution purchases at the sheriff's sale, after having indemnified the sheriff, and with notice of a defect in the title, he cannot come into equity, after paying a recovery had against him by the true owner, to be relieved of his purchase.—McCartney v. King, 681

JUSTICES OF THE PEACE.

1. In proceedings had before a justice of the peace, preliminary to the issue of a warrant for a public offence, technical accuracy is not required: it is sufficient, if, giving to the language employed its usual and ordinary signification, it shows that an offence against the criminal law has been committed.—Crosby v Hawthorn, 221
2. In an appeal case, the Circuit Court may render judgment for a larger sum than was allowed by the magistrate.—Waring & Co. v. Gilbert & Bro., 295
3. When an execution from a justice's court is levied on land in default of personal property, a *venditioni exponas*, or order of sale, from the Circuit Court, is only the means of satisfying the justice's judgment, and does not make it a judgment of that court.—Ellis, use &c., v. White, 540
4. By the common law, a justice of the peace had no civil jurisdiction, and his court was not a court of record. 540
5. Therefore, in declaring on a judgment rendered by a justice of the peace in another State, the declaration is fatally defective on demurrer, if it does not affirmatively show that the justice had jurisdiction by force of a local statute. 540

LEX MERCATORIA.

1. The law merchant cannot be proved by witnesses, but is matter of law for the court.—Jewell v. Center & Co., 498

LIMITATIONS, STATUTE OF.

1. The possession of slaves by a fraudulent vendee gives him no title under the statute of limitations, as against a creditor of the vendor, if the latter could not, by reasonable diligence, have discovered the fraud within six years before the levy of his execution —Snodgrass v. Branch Bank at Decatur, 161

MANDAMUS.

1. *Mandamus* from the Supreme Court does not lie to compel the Circuit Court to vacate an order suppressing a deposition.—*Ex parte* Elston, 72
2. When a non-resident is arrested under a bail writ, and compelled to give bond to keep out of jail, *mandamus* from the Supreme Court does not lie to compel the Circuit Court, on its refusal, to discharge the bail.—*Ex parte* Small, 74

MISTAKE.

1. A claim allowed against an insolvent estate for money paid by mistake, under these facts: The creditor, as administrator of the estate of the decedent's father, paid to the decedent's trustee (she being then a married woman) the distributive share of one of her brothers, which was supposed by all the parties to have been assigned to her husband for her separate use, and was afterwards compelled to pay it again to her husband's administrator, upon proof that the assignment was to the husband in his own right, and not for the separate use of his wife. Bird v. Bohannon's Adm'r, 279
2. On a bill filed by a vendee for the rescission of a contract, alleging a fraudulent misrepresentation of a material fact by the vendor, if the evidence shows an honest mistake only, the intent being immaterial, the variance between the *allegata* and *probata* is not fatal, and relief will be granted on proof of the mistake.—Lanier v. Hill, 554
3. An error of the clerk, in introducing in the judgment entry the name of a stranger as guardian of the plaintiff, may be amended by reference to the declaration on file, in which plaintiff declared in his own name without the intervention of a next friend or guardian; and it therefore will be amended on error or appeal, at the costs of the appellant.—Kennedy & Merritt v. Young, 563
4. Although a court of equity may, in certain cases, relieve against a mistake of law, yet the mistake must be gross and palpable, and such as would warrant the belief that an undue advantage was taken of the complainant, owing either to his imbecility of mind, or to the exercise of some improper influence over him either by the party with whom he dealt, or by some other person with the knowledge, consent, or procurement of that party.—Dill et al. v. Shahan, 694
5. If an executor purchase lands belonging to his testator's estate, at a public sale made by himself and his co-executors, under a mistake of law as to the power of sale conferred on them by the will, he cannot be relieved of his purchase in equity. 694

MORTGAGE.

1. A sale under a mortgage, made after the law day of the deed, and in pursuance of its terms, vests in the purchaser all the title conveyed by the mortgage, divested of the equity of redemption.—Cheek v. Waldrum and Wife, 152
2. When a mortgagor conveys mortgaged lands by an absolute conveyance, the estate of the purchaser is liable to be divested by a sale under the mortgage; and if the lands are subsequently sold under the mortgage, his widow is not entitled to dower in them. 152

MORTGAGE—CONTINUED.

3. Two foreclosure suits, pending in the same court, were consolidated by consent of counsel, and the second bill agreed to be taken as an answer and cross bill to the first; the first complainant admitted the validity of the second's mortgage, while the second alleged, on information and belief, that the first mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious: *Held*, that it was incumbent on the first complainant, as against the second, to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage; and that the evidence in the case was not sufficient to prove that the notes which he paid had been given in renewal of the secured notes.—De Vandal v. Malone's Executors, 272
4. The want of registration of a mortgage can only avail in favor of a subsequent mortgagee, who purchased, *bona fide*, in ignorance of it; and if he sets up that defence, he must deny notice, whether charged in the bill or not. 272

MOTION DOCKET.

1. The motion docket is no part of the records proper of the court; and if the clerk, in making out a transcript, copies into it entries on the motion docket, which have not been made a part of the record by motion to enroll or by bill of exceptions, they will be stricken out on motion. Waring & Co. v. Gilbert & Bro., 295

PARTNERSHIP.

1. Delivery by the surviving partner, of a note then assets of the firm, which had been endorsed in the name of the firm by the deceased partner in his lifetime, is not sufficient to pass the legal title to the purchaser.—Glasscock v. Smith, 474
2. When a firm is conducted under the individual name of one of the partners, the others, although they have given public notice of their interest in the firm, and are active, managing members, are dormant partners, and as such not necessary parties to a bill filed by the principal partner to enforce the payment of a firm debt from a debtor who contracted in ignorance of the dormant partners. (GOLDTHWAITE, J., *dissenting*.)—Bank of St. Marys, Winter, et al., v. St. John, Powers & Co., and Henley, 566
3. Although a court of equity considers and treats real property, purchased with the partnership funds, and held for the purposes of the firm, as constituting part of the stock of the partnership, it leaves the legal title undisturbed, except so far as may be necessary to protect the equitable rights of the respective partners.—Lang's Heirs v. Waring, 625
4. If the heirs of the deceased partner are sued, in equity, by a derivative purchaser from the surviving partner, for a divestiture of title, they have the right to show that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity should not sanction; and the fact that the firm is insolvent, and that all its assets are required to pay the debts, is no answer to their right to defend. 625

PARTNERSHIP—CONTINUED.

5. The case of Andrews' Heirs v. Brown (21 Ala. 437) was not intended to establish the doctrine, that a court of equity, in all cases where the surviving partner has disposed of the real estate of the firm, however unfair, inequitable, or unauthorized such disposition might be, would compel the heirs to convey: such a doctrine cannot obtain in equity. 625
6. If the surviving partner dispose of the real estate of the firm for a grossly inadequate consideration, and under such circumstances as were well calculated to cause it to be sold for an almost nominal sum, equity will not lend its aid to perfect such a sale; especially, when its action is invoked by one whose conduct contributed, in all probability, to bring about the sacrifice. 625
7. The surviving partner having executed a mortgage, in his own name only, on real estate belonging to the firm, to secure the payment of notes which he had executed in the name of the firm as surviving partner, but which created no obligation as against the firm, the land was subsequently sold under judgments, older than the mortgage, which had been rendered against him as surviving partner, and was purchased by one of the plaintiffs, who thereupon entered upon the land, and was in possession at the time of the sale under the mortgage, at which sale the land, though worth $8000, brought only $250; the first purchaser, having bought the interest of the second, and compromised with the administrator of the deceased partner, filed his bill in equity against the heirs to obtain a divestiture of their legal title: *Held*, that the court should not lend its aid to perfect such a sale, nor disturb the legal title of the heirs. 625

PLEADING AND PRACTICE AT LAW.

1. When application is made for a continuance on account of absent witnesses, the court, in the exercise of its discretion, may require the other party to admit the truth of the facts proposed to be proved by the absent witnesses, or, merely that those witnesses, if present, would swear to those facts; but an admission that the absent witnesses would swear to those facts is not an admission of their absolute truth.—Starr v. The State, 49
2. When an administrator refuses to plead the statute of limitations, the distributees of the estate cannot, on motion, be made parties to the cause for the purpose of putting in that plea.—*Ex parte* Perryman and Wife, 79
3. A rule which has become settled law is binding on the courts, and should be followed.—Martin's Executrix v. Martin, 201
4. In declaring (under the Code) against a person for neglecting to use due diligence in the collection of a judgment, out of the proceeds of which, when collected, he had promised in writing to pay a specified amount, it is not necessary to aver in what respect he had failed to use due diligence: an allegation that "he has failed and omitted to do so from mere neglect," is sufficient.—Gliddon v. McKinstry, 246
5. A plea, averring that plaintiff was not, at the commencement of the suit, the legal owner of the note sued on, only puts in issue the gen-

PLEADING AND PRACTICE AT LAW—CONTINUED.

uineness of the endorsement, and must be verified by affidavit.—Agee & Agee v. Medlock, 281

6. In *assumpsit* by the endorsee of a promissory note, the fact that plaintiff is not the owner of the note is not a good defence under the general issue. 281

7. When issue is joined on several pleas, one of which presents an immaterial issue, if the evidence sustains that plea, the defendant is not entitled to a general verdict. 281

8. In detinue for a slave, the plea of a former judgment in favor of the defendant is nothing more, in effect, than that the title to the slave was in the defendant at a day certain before the commencement of the suit; it is, therefore, defective on demurrer.—Wittick v. Traun, 317

9. The court has a discretion, under the Code, to allow an amendment of the complaint by the addition of another count, even after the jury has been instructed.—Prater v. Miller, 320

10. A chancery suit for the abatement of a livery stable as a nuisance was referred to arbitration by order of the court, and it was ordered that complainant's bill should be dismissed if she did not comply with the conditions of the award by the next term of the court. The arbitrators having awarded an exchange of lots between the parties, and the payment by complainant of the estimated difference in the value of the lots, and the complainant having failed to comply with the award, her bill was afterwards dismissed: *Held*, that the award was not final until the parties had performed, or offered to perform, the acts required to be done by them respectively; and therefore, a plea to an action on the injunction bond must aver performance, or a readiness to perform, on the part of the pleader.—Jessee v. Cater, 351

11. When a policy of insurance is assigned after a loss has accrued, the assignee may maintain an action on it in his own name, either under the act of 1828 (Clay's Digest, p. 383), or under the Code (§ 2129), although it contains the usual stipulation against assignment.—Perry v. Merchants' Ins. Co. 355

12. A plea in abatement of matters *de hors* the record is fatally defective on demurrer, if not verified by affidavit.—Hall and Wife v. Wallace, 438

13. In trespass to try titles, the pendency of another action between the parties for the same premises is not good matter for a plea in abatement. 438

14. When an action is brought by summons and complaint (under the Code) on a promissory note and an open account for work and labor done, it is error to render judgment final by default, for the aggregate amount of the sums claimed, without the intervention of a jury or the execution of a writ of inquiry.—Beville v. Reese, 451

15. When time is laid under a *videlicet*, the pleader is not required to prove it as alleged, and therefore, when the time of killing an estray is thus laid, although the time specified is within twelve months after the alleged straying, it is not a sufficient averment that it was within the twelve months.—Simpson v. Talbot, 469

16. When application is made for a continuance to enable plaintiff to retake the deposition of a witness, (who had stated, through inadvertence on his part or that of the commissioner, that another material

PLEADING AND PRACTICE AT LAW—CONTINUED.

witness for plaintiff was interested as a partner with him,) the court may, in its discretion, continue the cause unless the defendant will consent that the other witness may testify; and if the defendant elects to let him be examined, and the witness swears that he is not interested, in which statement he is sustained by the testimony of his confidential clerk, there is no error in his admission.—Jewell v. Center & Co., 498

17. When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and it does not lie with him to say that any portion of it is illegal or incompetent. 498

18. If a party introduces and examines in chief a witness who has an interest adverse to him, he thereby waives all objection to his incompetency from interest, and confers on his adversary the right to examine the witness fully as to his knowledge touching any and all facts material to the case.—Kelly v. Brooks, 523

19. An appearance by the defendant merely for the purpose of moving to set aside the service of the writ, is not a waiver of any defect or irregularity in the service; but if, after such an appearance, he takes any action in relation to the case which recognizes it as in court, disconnected from the motion, whether the motion is then pending or not, this is a waiver of the defect or irregularity.---Lampley v. Beavers, 534

20. On a trial of the right of property, the claimant having applied for a continuance, it was shown that, at the last term, the cause had been continued by him on the payment of all costs, and that he had failed to comply with that order, although with full knowledge of it; and his attorney being then in court, and refusing to comply with said order, or to show cause against it, the court refused the continuance, and would not put the plaintiff on the admission of the facts which the claimant stated his absent witness would prove, but informed the claimant that he should not be permitted to defend the suit, unless the costs were paid, or cause shown why they should not be paid; and on the claimant's continued refusal to pay the costs, or to show cause, the court would not permit him, on the trial, to offer evidence to show title in himself to the property, and confined him to evidence merely of its value: *Held*, that the action of the court was erroneous; and the judgment was therefore reversed, and the cause remanded.---Montgomery & Wetumpka Plank Road Co. v. Persse, Taylor & Co., 536

21. In declaring on a judgment rendered by a justice of the peace in another State, the declaration is fatally defective on demurrer, if it does not affirmatively show that the justice had jurisdiction by force of a local statute.—Ellis, use &c., v. White, 540

22. On motion to supply a lost record, the proper practice is as follows: The notice of the motion must specify when the motion will be made, and must contain a copy of that which the plaintiff will move the court to enroll as the substance of the lost record; and the defendant must have reasonable personal service of the notice, and of the affidavits by which it will be supported, which affidavits may be

PLEADING AND PRACTICE AT LAW—CONTINUED.

controverted by counter affidavits. If the court, on hearing the affidavits, is fully satisfied of the correctness of the proposed substitute, it will order the same to stand enrolled as the original lost record. Adkinson *et al.* v. Keel, use &c., 551

23. The appearance of the defendant, and the withdrawal of his plea, are a waiver of any defect in the service of process, and an admission of the legal liability charged in the declaration.—Kennedy & Merritt v. Young, 563

24. In assumpsit on a promissory note, if the defendant, after appearance, withdraws his plea, the court may render judgment for the amount of the note and interest thereon, without regard to the amount of damages laid in the declaration. 563

25. To charge the separate estate of a married woman, under the act of 1850 (Pamph. Acts 1849-50, p. 65), with "articles of family supply," the declaration must allege that she holds her separate estate either under the act of 1850, or that of 1848, to which it is an amendment; an averment, that she has a separate estate "which came to her after the first day of March, 1848," is not sufficient.—Cunningham v. Fontaine, 644

26. If the husband dies before suit brought, the right of action survives against the wife, for articles of family supply under the act of 1850. 644

27. When a *scire facias* to revive a suit is issued against several executors, and executed on all save one, there is no discontinuance in proceeding without him, if the record does not show that he ever qualified; and if the record shows that he died several terms before the trial was had, and that the cause was afterwards treated by all the parties as regularly in court, the irregularity (if any) is cured, and cannot avail on error.—Sherrod's Ex'rs v. Hampton, 652

28. In case, to recover damages for the loss of a slave who was killed while working on defendant's house, if the declaration avers fraudulent concealment by defendant of the dangerous condition of the house, and also fraudulent representations that it was safe, it is not demurrable for duplicity, but the latter averment may be stricken out as surplusage.—Perry v. Marsh, 659

29. If the concealment of the danger by the employer amounts to a breach of duty sufficient to support an action on the case for damages, an additional averment of fraudulent intent may be stricken out as surplusage. 659

30. In an action on a guaranty, where notice of acceptance is necessary to charge the guarantor, notice must be averred in the declaration; but the general allegation ("of all which aforesaid premises the said defendant," &c., "then and there had notice"), when the declaration states facts on which it can operate, is sufficient.--Fay v. Hall, 704

31. The declaration must also aver the terms of the credit given to the principal debtor, and his failure to pay. 704

PLEADING AND PRACTICE IN CHANCERY.

1. On an application to the Supreme Court for a prohibition, or other remedial writ, to vacate certain orders of the Chancery Court, in the appointment of a receiver and the imprisonment of the petitioner for

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

contempt of court, in refusing to pay over certain moneys in his hands, the bill will not be examined and construed with the same degree of strictness as to technical accuracy as on demurrer: if it shows that the court had jurisdiction of the parties and the subject-matter, although defective in some matter which might be supplied by amendment, it will be held sufficient, and a prohibition will not be awarded.—*Ex parte* Walker, 81

2. Therefore, in this case, a prohibition was refused, because, it was held, the bill was sufficient to give the court jurisdiction, being filed against a trustee, by persons who showed an interest in the trust fund, to prevent its waste and misapplication. 81

3. The appointment of a receiver is a matter of discretion with the chancellor; and where a bill is filed by the creditors of an estate, against a person who has obtained possession of funds belonging to it by representing himself to be the executor, and who is alleged to be insolvent, a receiver is properly appointed. 81

4. A chancellor has power under the Code (§§ 561, 3008, 3009, 3010, 3011) to issue an attachment for contempt of court, against any party to a cause who refuses obedience to his orders. 81

5. Where the refractory party is in court, and has personal notice of the order with which he refuses to comply, it is not necessary that he should be served with a writ of execution of the decretal order, nor with notice that a motion will be made for an attachment against him. 81

6. It is not a valid objection to the order for the issue of an attachment, that it directs the imprisonment of the refractory party until he complies with the violated decree, directing him to pay over certain moneys in his hands to a receiver, and also gives bond to appear at the next term of the court and answer for his contempt. 81

7. Nor can the defendant claim, as a matter of right, that he should be allowed to give bond for the forthcoming of the money in his hands before the order for an attachment is made: that is a matter to be addressed to the sound discretion of the chancellor, who may order the attachment without it. 81

8. A bill filed by a married woman against several execution creditors of her husband, seeking to enjoin the sale of her separate property under their executions, and to reform, if necessary, the deeds under which she claims, is not multifarious.—Bridges & Co. v. Phillips, 136

9. Where slaves are partly purchased and paid for with the money of the husband, and a bill of sale taken to himself as trustee of his wife, he has such an interest in them as may be subjected to the payment of his debts; but his creditors must file a bill for this purpose, to ascertain and separate his interest from that of his wife. 136

10. Where the bill alleges a gift of slaves to complainant "*to her separate use for life, with remainder to her children,*" while the proof shows a gift "*to her and the heirs of her body,* free from the control of her husband," the variance between the *allegata* and *probata* is fatal.—Crabb's Adm'r v. Thomas, 212

11. Two foreclosure suits, pending in the same court, were consolidated by consent of counsel, and the second bill agreed to be taken as an answer and cross bill to the first; the first complainant admitted the

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

validity of the second's mortgage, while the second alleged, on information and belief, that the first mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious: *Held*, that it was incumbent on the first complainant, as against the second, to prove the existence and *bona fides* of the debt which constituted the consideration of his mortgage; and that the evidence in the case was not sufficient to prove that the notes which he paid had been given in renewal of those embraced in the mortgage, although the mortgage provided for the renewal of the secured notes.—De Vendal v. Malone's Executors, 272

12. The want of registration of a mortgage can only avail in favor of a subsequent mortgagee, who purchased, *bona fide*, in ignorance of it; and if he sets up that defence, he must deny notice, whether charged in the bill or not. 272

13. When complainant has several times examined a defendant as a witness (once in chief, and twice on cross interrogatories) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time on the hearing. 272

14. The surviving brothers and sisters of a deceased infant may recover, in equity, a legacy bequeathed to them jointly with him, without administration on his estate, when there are no debts against it.—Vanzant v. Morris, 285

15. When the trustee alleges in his answer that the assignor, with full knowledge of all the facts, assented to his settlement of a debt by taking lands in satisfaction of it, this is matter in avoidance, which requires evidence *aliunde* to sustain it.—Royall's Adm'r v. McKenzie, 363

16. When the order of reference directs the master to take an account of the expenses of executing the trust, and to ascertain what would be a reasonable compensation to the trustee, should the court decree compensation; and the master reports, as a reasonable compensation, a certain per cent. on the amount of the available assets, which are also ascertained and reported under another part of the reference, the report conforms to the reference. 363

17. If the bill alleges that complainant was a *bona fide* creditor at the time his judgment was confessed, and an exemplification of the record of the judgment is exhibited showing that it was founded on a note bearing date anterior to the defendant's purchase, the allegation is sufficient, without setting out the particulars of the consideration of the note.—Couthway v. Berghaus, 393

18. When the purchaser does not deny the existence of the indebtedness on which the judgment was confessed, but professes ignorance of it, and avers that he had offered to pay the amount of the judgment and retain the land, proof by one witness of his confession "that he had satisfied himself that the judgment was good, and that the right to redeem under it existed," is sufficient. 393

19. The Chancery Court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*.—Preston v. Dunn, 507

20. The improper exercise of this power may be reviewed on error, but

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

the act itself is not void; and the decree rendered cannot be collaterally attacked by the infant for want of jurisdiction, although the appointment was made without service of process. 507

21. When an infant defendant to a bill of revivor is described as the deceased defendant's "only infant son whose name is unknown," the decree rendered against him is not void for uncertainty, and cannot be collaterally impeached; especially when the infant, by his subsequent bill to redeem lands sold under the decree, shows that he is the person against whom the bill of revivor was filed. 507

22. A sole plaintiff in chancery may, after answer filed, but before any order or decree taken, dismiss his bill at his own costs without prejudice. (But *note*, that this is now changed by the 28th Rule of Chancery Practice, which took effect on the first day of November, 1854.—REP.)—Howard v. Bugbee, 548

23. A bill for the rescission of a contract of sale alleged that the vendor sold and conveyed to two of the complainants, while the deed, which was made an exhibit to the bill, conveyed the lands to one of the complainants only: *Held* no material variance, as the defendant could not have been taken by surprise.—Lanier et al. v. Hill et al., 554

24. On a bill filed by a vendee for the rescission of a contract, alleging a fraudulent misrepresentation of a material fact by the vendor, if the evidence shows an honest mistake only, the intent being immaterial, the variance between the *allegata* and *probata* is not fatal, and relief will be granted on proof of the mistake. 554

25. If one of several joint makers of a note, given for the purchase money of land, promises a third person that he will pay it if the latter purchases it, and the latter takes the note on the faith of that promise, the promisor may, notwithstanding his promise, join with the other makers of the note in a bill for the rescission of the contract of sale; but he will not be entitled to any relief against the holder who purchased on the faith of his promise. 554

26. When a bill in equity is filed, under the attachment law of 1846, against a debtor who is alleged to be a non-resident, the defendant cannot deny his non-residence.—Bank of St. Marys, Winter, et al. v. St. John, Powers & Co., and Henley, 566

27. If the defendant, after an irregular decree *pro confesso* has been entered against him, appears by solicitor, and makes motions in the cause, without objecting to the irregularities in the decree, he will be held to have waived them, and cannot take advantage of them on error. 566

28. A decree *pro confesso* will not be set aside to allow a plea to be filed. 566

29. When a cause is submitted at a regular term of the court, and held under advisement until vacation on request of defendant's solicitor, the defendant cannot complain on error that the chancellor rendered his decree in vacation. 566

30. When a firm is conducted under the individual name of one of the partners, the others, although they have given public notice of their interest in the firm, and are active managing members, are dormant partners, and as such not necessary parties to a bill filed by the

PLEADING AND PRACTICE IN CHANCERY—CONTINUED.

principal partner to enforce the payment of a firm debt from a debtor who contracted in ignorance of the dormant partners. (GOLDTHWAITE, J., *dissenting*.) 566

31. When a bill is dismissed without prejudice, the effect of the reservation is, to prevent the decree from constituting a bar to another bill brought upon the same title ; but it by no means compromits the court as a judicial determination in favor of that title.—Lang's Heirs v. Waring, 625

32. A cross bill cannot be sustained when the original bill is without equity, nor when it is inconsistent with the answer.—Dill et al. v. Shahan, 694

PRESUMPTIONS.

1. The common law is presumed to exist in our sister States, in the absence of an averment to the contrary.—Ellis, use &c., v. White, 540

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PROHIBITION.

1. On an application to the Supreme Court for a prohibition, or other remedial writ, to vacate certain orders of the Chancery Court, in the appointment of a receiver and the imprisonment of the petitioner for contempt of court, in refusing to pay over to the receiver certain moneys in his hands, the bill will not be examined and construed with the same degree of strictness as to technical accuracy as on demurrer : if it shows that the court had jurisdiction of the parties and the subject-matter, although defective in some matter which might be supplied by amendment, it will be held sufficient, and a prohibition will not be awarded.—*Ex parte* Walker, 81

2. Therefore, in this case, a prohibition was refused, because, it was held, the bill was sufficient to give the court jurisdiction, being filed against a trustee, by persons who showed an interest in the trust fund, to prevent its waste and misapplication. 81

PROMISSORY NOTES.

1. A plea, averring that plaintiff was not, at the commencement of the suit, the legal owner of the note sued on, only puts in issue the genuineness of the endorsement, and must be verified by affidavit.—Agee & Agee v. Medlock, 281

2. The holder of a note endorsed in blank may fill it up with any name he pleases. 281

3. In *assumpsit* by the endorsee of a promissory note, the fact that plaintiff is not the owner of the note is not a good defence under the general issue. 281

4. Where several notes, taken for the purchase money of land, are assigned at different times, the assignment of each note is, *pro tanto*,

PROMISSORY NOTES—CONTINUED.

an assignment of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes.—Griggsby v. Hair, 327

5. Delivery by the surviving partner, of a note then assets of the firm, which had been endorsed in the name of the firm by the deceased partner in his life-time, is not sufficient to pass the legal title to the purchaser.—Glasscock v. Smith, 474

6. An endorsee who acquires a note after maturity takes it subject to all defences existing in favor of the maker as against the payee or other party for whose accommodation it was made. 474

7. When the vendee makes out a case which entitles him to a rescission of the contract, the collection of the purchase money will be enjoined, without regard to the solvency of the vendor; and the same rule obtains against an assignee of the vendor, unless the notes were mercantile and passed in the course of trade to a *bona fide* holder. —Lanier v. Hill, 554

8. If one of several joint makers of a note, given for the purchase money of land, promises a third person that he will pay it if the latter purchases it, and the latter takes the note on the faith of that promise, the promisor may, notwithstanding his promise, join with the other makers of the note in a bill for the rescission of the contract of sale; but he will not be entitled to any relief against the holder who purchased on the faith of his promise. 554

9. In assumpsit on a promissory note, if the defendant, after appearance, withdraws his plea, the court may render judgment for the amount of the note and interest thereon, without regard to the amount of damages laid in the declaration.—Kennedy & Merritt v. Young, 563

RAILROADS.

1. The act of 1852 (Pamph. Acts 1851-2, p. 45), "to regulate and define the liability of railroad companies," does not conflict with the act of 1850 (Pamph. Acts 1849-50, p. 17) granting the right of way through Jackson county to the Nashville and Chattanooga Railroad Company.—Nash. & Chat. R. R. Co. v. Peacock, 229

2. To entitle the plaintiff to a recovery against a railroad company under the act of 1852, it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by the defendant's cars or locomotives. 229

3. Whether any degree of care and diligence on the part of the defendant will excuse it, *quære?* 229

4. That the cattle were killed while roaming on lands which did not belong to their owner, is no defence to the action, as the doctrine of the common law in relation to *damage feasant* has never been adopted in this State. 229

5. A proceeding by notice and motion, on the part of a railroad company, against a delinquent stockholder, is a suit within the meaning of section 2398 of the Code; and security for the costs must be given when the notice is placed in the hands of the sheriff to be served.—Ala. & Tenn. River R. R. Co. v. Harris, 232

RECEIVER.

1. The appointment of a receiver is a matter of discretion with the chancellor; and where a bill is filed by the creditors of an estate, against a person who has obtained possession of funds beolnging to it by representing himself to be the executor, and who is alleged to be insolvent, a receiver is properly appointed.—*Ex parte* Walker, 81

REDEMPTION OF REAL ESTATE.

1. A judgment creditor by confession (if *bona fide*) is entitled to redeem real estate sold under mortgage or execution under the act of 1842; but the purchaser may, at his peril, compel a resort to equity to establish the *bona fides* of the debt.—Couthway v. Berghaus, 393
2. If the bill alleges that complainant was a *bona fide* creditor at the time his judgment was confessed, and an exemplification of the record of the judgment is exhibited showing that it was founded on a note bearing date anterior to the defendant's purchase, the allegation is sufficient, without setting out the particulars of the consideration of the note. 393
3. If the judgment was confessed before the expiration of the time allowed for redemption, though after the sale, the creditor may redeem. 393
4. When the purchaser does not deny the existence of the indebtedness on which judgment was confessed, but professes ignorance of it, and avers that he had offered to pay the amount of the judgment and retain the land, proof by one witness of his confession "that he had satisfied himself that the judgment was good, and that the right to redeem under it existed," is sufficient. 393
5. Although an agent to make a tender cannot delegate his authority to another, yet he may make the tender by letter sent by the hands of another. 393
6. If the purchaser only objects to the amount tendered, and declares that he is not satisfied that the complainant is a *bona fide* creditor, he cannot afterwards raise an objection to the authority of the person through whom the tender was made, nor to the fact that the money was tendered in bank notes. 393
7. Where the legal title is in a naked trustee, who has no interest whatever in the land and is a non-resident, while the *cestui que trust*, who can control the title, is in possession, and in perception of the rents and profits, the tender may be made to the latter. 393
8. The purchaser has not six months within which to make his election, but must make it within a reasonable time, and must notify the creditor of his election and tender a compliance: merely saying that he will pay the sum bid and retain the land, without offering to pay or securing the payment, amounts to nothing. 393
9. If the purchaser has extinguished a prior incumbrance on the land, he should be allowed the amount paid by him, with interest. 393

RETAILING SPIRITUOUS LIQUORS.

See Criminal Law, 18, 19, 24, 25, 26.

SET-OFF.

1. Unliquidated damages, sounding in tort, are not the subject of a set-off, either at law or in equity.—Pulliam v. Owen & Russell, 492

SHERIFFS.

1. When a sheriff takes a bond from his deputy, conditioned for the faithful discharge of his duties, he is not required to notify the sureties of the deputy's default before bringing suit on the bond; and therefore, in a suit on their bond, evidence of the deputy's ability to pay at the time of his leaving the State, and afterwards, is not admissible evidence for the sureties.—McGehee v. Gewin, 176
2. If the sheriff pays to the plaintiff the amount of an execution then in force in his deputy's hands, and the deputy afterwards collects it from the defendant in execution, his sureties are liable on their bond if he fails to account for it, as no one but the defendant in execution can take advantage of the payment by the sheriff. 176
3. The deputy having "proposed to pay" the money collected by him to his principal, the latter "told him he would see the persons it was going to, and that he could pay it to them": *Held*, that this did not amount to a legal tender of the money to the principal, but was a direction to pay it to the persons entitled to receive it; and on his failure to do this, in consequence of which the principal was compelled to pay it, the sureties of the deputy were liable on their bond. 176
4. The surety cannot discharge himself from liability on his bond by giving notice to the sheriff that he will no longer be bound for the deputy. 176

SLAVES AND FREE PERSONS OF COLOR.

1. A slave's confessions of guilt to his master, when elicited or influenced by the fear of punishment or the hope of some benefit to be gained by making them, is not admissible evidence against him; and his subsequent repetition of them before the examining magistrate, if made in the presence of his master, is equally inadmissible, unless it is clearly shown that he was free from the least apprehension of punishment from his master as a consequence of his recantation.—Wyatt v. The State, 9
2. Therefore, in this case, the slave's confessions to his master were excluded, because the latter had said to him, "Boy, these denials only make the matter worse;" and the repetition of them before the examining magistrate, in the presence of the master, was also ruled inadmissible, the justice having failed to caution him as to their effect. 9
3. The statutory offence of mayhem (Code, § 3105) may be committed on a slave.—Eskridge v. The State, 30
4. Although the master may use such means, and so much force, to any extent, as will be effectual to subdue his slave, yet he may not deprive the slave of life or limb, unless impelled to such an act by necessity. 30
5. A person who believes that his property has been stolen by a slave, has no right, without process of law, to search the slave's dwelling on the premises of his master.—Thompson v. The State, 41

SLAVES AND FREE PERSONS OF COLOR—CONTINUED.

6. A free person of color, whose mother was an inhabitant of Mobile when the territory was ceded by Spain to the United States, is included in the act of 1852 (Pamph. Acts 1851-2, p. 80), prohibiting the sale of spirituous liquors to free persons of color.—Lodano v. The State, 64
7. A slave's confession, made in the presence of his master and the plaintiff, that he has received from another slave stolen money belonging to plaintiff, involves no charge against his master, and calls for no reply from him; and therefore the master's silence cannot be construed into an admission on his part of any of the facts to which the confession related.—Jelks v. McRae, 440

STATUTES, CONSTRUCTION OF.

1. Although penal statutes are to be strictly construed, and cannot be extended by construction, yet they are not to be construed so strictly as to defeat the obvious intention of the Legislature.—Crosby v. Hawthorn, 221
2. When a statute requires notice to be given, but does not specify the length of time, it will be construed to mean a reasonable time.—Burden v. Stein, 456

SUMMARY JUDGMENTS.

1. When a judgment, rendered against the sureties on a guardian's bond, is paid in full by one of them, who then moves for a summary judgment against one of his co-sureties, the defendant cannot go behind the judgment and show that the guardian's default, for which the judgment was rendered, was not covered by their bond, but by a prior bond, to which he was no party, and on which the plaintiff was bound.—Waller v. Campbell, 544
2. Nor will he be allowed to prove that the infant's attorney informed plaintiff, before the latter paid the judgment, that the suit was brought by mistake on the wrong bond, and that unless the judgment was paid, another suit would be brought on the other bond; and that plaintiff, after being so informed, paid the judgment. 544
3. If the judgment entry shows a verdict for the plaintiff in the motion on issue joined, this is equivalent to spreading all the facts recited in the motion on the record as proved. 544
4. Under the Code (§ 2645) a surety, who has paid a judgment rendered on a guardian's bond against himself and his two co-sureties, is entitled to a summary judgment, on motion, against one of his co-sureties, for one half the amount paid, when the other surety is insolvent, and the principal was dead before the judgment was rendered. 544

SURETIES.

1. It is a general rule, founded on principles of natural reason and justice, that a surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which the creditor had for the purpose of re-imbursing himself; but he can acquire no greater rights than the creditor had.—Houston v. Br. Bank at Huntsville, 250
2. G. executed a deed of trust to secure the acceptors of two bills of exchange, one of which, drawn by himself, and accepted for his accom-

SURETIES—CONTINUED.

modation, was negotiated and held by the Branch Bank at Huntsville, and the other, to which he was no party, but which was drawn, endorsed and accepted for his accommodation, negotiated and held by the Branch Bank at Decatur; the debt to the latter Bank was extended under the act of 1837; the bill delivered up to the drawer and cancelled, a new note executed by him, with the other endorser and G. as sureties, and another deed thereupon executed by G. to secure the payment of this note: *Held*, that the payment of this note by the surety did not entitle him, under the equitable doctrine of subrogation, to share in the security afforded by the first deed. 250

3. When a judgment, rendered against the sureties on a guardian's bond, is paid in full by one of them, who then moves for a summary judgment against one of his co-sureties, the defendant cannot go behind the judgment and show that the guardian's default, for which the judgment was rendered, was not covered by their bond, but by a prior bond, to which he was no party, and on which the plaintiff was bound.—Waller v. Campbell, 544

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TRESPASS TO TRY TITLES.

1. In trespass to try titles, the plaintiff is entitled to recover damages for the rents accruing up to the time of the verdict, and therefore the judgment is conclusive that they were recovered; and the fact that the action was against a tenant whose term expired before the rendition of the judgment, if his landlord was made a party, makes no difference.—Shumake v. Nelms' Adm'r, 126

2. After a recovery in trespass to try titles, trespass for the mesne profits accruing after the rendition of the judgment and before the execution of the writ of possession, lies against the defendant in the first action, or against any one coming into possession under him; but if the tenant, in such case, comes into possession under an express promise to pay rent to the defendant, the plaintiff cannot maintain *assumpsit* for use and occupation against him. 126

3. A recovery in ejectment, or in trespass to try titles, is conclusive between the parties and their privies, as to the title of the plaintiff's lessor, in a subsequent action for the rents and profits. 126

4. In trespass to try titles, the pendency of another action between the parties for the same premises is not good matter for a plea in abatement.—Hall and Wife v. Wallace, 438

5. In trespass to try titles, a verdict finding that "the land belongs to the plaintiff" will be held sufficient, on error, under the liberal rules of intendment, to support a judgment in favor of plaintiff for damages and costs, and the award of a writ of *habere facias possessionem*. Stephens v. Westwood, 716

TRESPASS TO TRY TITLES—CONTINUED.

6. If no claim or suggestion for improvements is made by the pleadings, (Clay's Digest, p. 320, § 47,) the defendant cannot complain, on error, of the action of the court in refusing to allow him to offer evidence of the value of his improvements. 716

TRIAL OF THE RIGHT OF PROPERTY.

1. On a trial of the right of property in slaves, the claimant derived title under a bill of sale from the defendant in execution, which the plaintiff attacked for fraud; and it was shown that the slaves had remained in the claimant's possession for about four years from the date of the bill of sale: *Held*, that the plaintiff might prove that the defendant in execution was decreed a bankrupt at the expiration of that time, and that the slaves were found in his possession a few months afterwards.—Snodgrass v. Branch Bank at Decatur, 161
2. The record of a judgment rendered against the defendant in execution after his sale to the claimant, is not admissible evidence, as against the claimant, to prove an indebtedness prior to its rendition. 161
3. On a trial of the right of property under the statute, the declaration of the person in whose possession the property was found, made at the time the attachment was levied on it, that it was brought to his house by the defenpant in attachment, is admissible evidence against the claimant.—Derrett v. Alexander, 265
4. The death of an animal attached, before the trial of the claim suit, does not affect the right of recovery, and evidence of it is therefore inadmissible. 265
5. When two attachments, sued out between the same parties, are levied on the same property, and a claim interposed in each case by the same person, a judgment in one case, finding the property subject to the execution, is conclusive evidence that it is also subject in the other. 265
6. The payment by the claimant of the assessed value of the property in the first case, does not, of itself, sustain his claim in the second. 265
7. If the property is found subject to the attachment, it is erroneous to render judgment in the claim suit against the sureties on the replevy bond; and where the case is removed by *certiorari* from a justice's court, it is also erroneous to render judgment for the assessed value of the property against the sureties on the *certiorari* bond. 265
8. When the property is condemned in the Circuit Court, the proper practice is, to certify the judgment, with a *procedendo*, to the justice, who thereupon issues execution; if the defendant fails to deliver the property, the failure being endorsed on the claim bond, which is filed with the justice, execution issues against the principal and surety therein for the assessed value of the property, if that value does not exceed the amount of the judgment and costs in the attachment suit, and if it exceeds that amount, then for the judgment and costs; but for the costs of the claim suit, on the trials before the justice and in the Circuit Court, the latter court should render judgment against the claimant and his sureties on the *certiorari* bond. 265

TROVER.

1. Trover for the conversion of a stolen slave cannot be maintained against the thief before the institution of a prosecution against him for the felony.—Martin's Executrix v. Martin, 201

TRUSTEES AND CESTUIS QUE TRUST.

1. When a bill in equity is filed to compel a settlement and account of an assignment, consisting principally of notes and accounts under twenty dollars against debtors who were residents of the district in which the trustee lived, the trustee, in the absence of all special cause, should be allowed twelve months from his acceptance of the trust for the collection of the debts, and should be charged with interest on the available assets from the expiration of that time.—Royall's Adm'r v. McKenzie, 363
2. The trustee's own note, when included in the assignment, should be charged as cash in his hands from the time it falls due. 363
3. Where the assignor, after the lapse of a sufficient time for closing the assignment, agrees with the trustee that, on the latter confessing judgments in favor of certain preferred creditors, the balance shall stand open for future adjustment, the trustee should nevertheless be charged with interest on that balance from that time. 363
4. It is the duty of the trustee to use all necessary means, by action or otherwise, to realize the debts; if a debt is lost by his neglect of this duty, where the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive. 363
5. When the trustee alleges in his answer that the assignor, with full knowledge of all the facts, assented to his settlement of a debt by taking lands in satisfaction of it, this is matter in avoidance, which requires evidence *aliunde* to sustain it. 363
6. If the trustee, without the sanction of the *cestuis que trust*, receives lands in settlement and satisfaction of the trust debts, equity will hold him responsible for whatever loss may ensue, and, if the *cestuis que trust* so elect, treat the lands as his own individual property. 363
7. The trustee is not estopped from showing that the actual amount of any debt is less than that specified in the assignment, and he would only be accountable for the actual amount of it. 363
8. If the deed confers no authority on the trustee to compromise the debts, he cannot compromise them without the consent of the beneficiaries. 363
9. The trustee is chargeable with the amount of a debt, although the evidence is conflicting as to the debtor's solvency, upon proof that he had had a settlement with the debtor, and had paid him in cash the balance found in his favor. 363
10. He is also chargeable with rents accruing under a lease included in the assignment, upon his own admission of the lease and proof of the lessee's solvency. 363
11. Also, with the value of articles of personal property embraced in the assignment, to which he is shown to have asserted title, although he denies that they ever came to his possession. 363

TRUSTEES AND CESTUIS QUE TRUST—CONTINUED.

12. A trustee, who, after accepting the trust, voluntarily permits his co-trustee to take the entire management of it, and the possession and control of the trust property, is equally with him liable to account: and on bill being filed against both for an account and settlement of the trust, he is an incompetent witness for his co-defendant to prove the insolvency of the debtors. 363
13. If the trustee buys up the secured debts at less than their nominal value, he is only entitled, on a settlement of the trust in equity, to a credit for the amount actually paid by him. 363
14. Where the legal title is in a naked trustee, who has no interest whatever in the land and is a non-resident, while the *cestui que trust*, who can control the title, is in possession, and in perception of the rents and profits, the tender to redeem may be made to the latter. —Couthway v. Berghaus, 393
15. The assignee of a title bond, who is notified at the time the transfer is made that one of the tracts of land embraced in the bond has been previously sold to another, and who afterwards takes to himself a conveyance for the entire tract, will be held in equity a trustee of the legal title for the benefit of the prior purchaser.—Dickinson & Winn v. Any, 424
16. Compensation, when applied to trustees, means but little (if anything) more than a liberal indemnity.—Gould v. Hays, 426

USURY.

1. When the defendant is offered as a witness (under the statute) to sustain his plea of usury, he is not confined in his testimony to the note on which the suit is founded, but may detail the history of the whole transaction,—beginning with the original usurious contract, showing the payments on cancelled notes, the taking of new notes for the balance, &c.—Swinney & Palmer v. Dorman, 433
2. When money is borrowed by two jointly, but for the benefit of one, and a joint note given by them, on which they are both sued, either one is a competent witness under the statute to prove usury. 433

VENDOR AND VENDEE.

1. The fact that the vendor acted in bad faith, and attempted to repudiate his contract altogether, does not relieve the vendee from the payment of interest, on a bill filed to enforce a vendor's lien.—Cheek v. Waldrum and Wife, 152
2. Where several notes, taken for the purchase money of land, are assigned at different times, the assignment of each note is, *pro tanto*, an assignment of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes.—Griggsby v. Hair, 327
3. An assignment of a note without recourse by the vendor, amounts to an abandonment of the lien: but whether or not the parties intended to abandon the lien, is a matter of fact to be gathered from the evidence and the nature of the transaction. 327
4. When a vendee holds only a bond for titles to be made on full pay-

VENDOR AND VENDEE—CONTINUED.

ment of the purchase money, a purchaser from him cannot be regarded in equity as a *bona fide* purchaser for valuable consideration without notice, although he saw in the vendee's possession his notes for the purchase money; the conditional bond is sufficient to charge the purchaser with notice of the vendor's lien for the unpaid purchase money, and to put him on inquiry as to the facts.—Bradford v. Harper, 337

5. If the vendor transfers to a stranger the notes given for the purchase money, and accepts for them a bill of exchange, his lien on the land is gone, and the vendee, on making full payment to the transferree, becomes entitled to an absolute conveyance; but if the transferree was acting as agent of the vendee, or was jointly concerned with him in the purchase, and made the arrangement for their joint benefit, without an express promise on the part of the vendor to receive the bill of exchange in absolute payment of the notes, and thereby to abandon his lien, the land is still bound to the vendor for the payment of the purchase money on the non-payment of the bill. 337

6. Suspicion of fraud on the part of the defendant, coupled with gross inadequacy of price, and the pressure of pecuniary embarrassment on the part of complainant, is sufficient to induce a court of equity to rescind a contract of sale.—Lester v. Mahan, 445

7. In this case the contract was rescinded, upon proof that the complainant, who was in embarrassed circumstances, (his property levied on, and about to be sold under execution,) sold his farm to defendant, received part of the price in cash, and for the residue accepted a deed from defendant to a tract of land lying in Georgia, which complainant had never seen, and which was not worth more than one half the amount at which it was estimated in the transaction. 445

8. The vendor cannot, after he has received full payment of the purchase money, resist a specific performance of his contract, on the application of the vendee's assignee, on the ground that the vendee has committed trespasses on his other lands, and is insolvent.—Pulliam v. Owen & Russell, 492

9. A court of equity will not rescind a contract for the sale of lands, on account of a defect in the title, when a conveyance has been executed and accepted, and there is no fraud or misrepresentation; but where there is a misrepresentation of a material fact, which was believed and acted upon by the party seeking relief, it is immaterial, in the view of a court of equity, whether or not the party making the statement knew it to be false.—Lanier v. Hill. 554

10. On a bill filed by a vendee for the rescission of a contract, alleging a fraudulent misrepresentation of a material fact by the vendor, if the evidence shows an honest mistake only, the intent being immaterial, the variance between the *allegata* and *probata* is not fatal, and relief will be granted on proof of the mistake. 554

11. When the vendee makes out a case which entitles him to a rescission of the contract, the collection of the purchase money will be enjoined, without regard to the solvency of the vendor; and the same rule obtains against an assignee of the vendor, unless the notes were mercantile and passed in the course of trade to a *bona fide* holder. 554

VENDOR AND VENDEE—CONTINUED.

12. If one of several joint makers of a note, given for the purchase money of land, promises a third person that he will pay it if the latter purchases it, and the latter takes the note on the faith of that promise, the promisor may, notwithstanding his promise, join with the other makers of the note in a bill for the rescission of the contract of sale; but he will not be entitled to any relief against the holder who purchased on the faith of his promise. 554

VENIRE FACIAS.

1. A *venire facias* is not void for the want of the seal of office of the court from which it issues.—Powell v. The State, 21

VERDICT.

1. When issue is joined on several pleas, one of which presents an immaterial issue, if the evidence sustains that plea, the defendant is not entitled to a general verdict.—Agee & Agee v. Medlock, 281
2. In trespass to try titles, a verdict finding that "the land belongs to the plaintiff" will be held sufficient, on error, under the liberal rules of intendment, to support a judgment in favor of plaintiff for damages and costs, and the award of a writ of *habere facias possessionem*. Stephens v. Westwood, 716

WARRANTY.

1. The measure of damages for a breach of a warranty of title to a slave, which is afterwards recovered from the vendee in a suit of which the vendor had notice, is the value of the slave at the time of his purchase, with interest thereon, and the cost necessarily incurred by him in the suit brought against him to test the title, with interest thereon from the time of its payment.—Rowland's Adm'rs v. Shelton, 217

WATER WORKS OF MOBILE.

1. Under the act of 1841 (Pamph. Acts, p. 5) giving the lessee of the "City Water-Works" of Mobile a writ of *ad quod damnum* to ascertain the damage caused to riparian proprietors by his diversion of the water from Three-Mile creek, the writ may be sued out as well after as before the erection of the water-works, and against any one or more of the riparian proprietors.—Burden v. Stein, 455
2. If the writ commands the sheriff to make his return thereon, with the proceedings had under it, "*within ten days from the date of the writ*," it is a sufficient compliance with the requisition of the statute that the jury shall be summoned to view the premises "*at a time not exceeding ten days from the issuing of the writ*," although it specifies no day for the summoning of the jury. 455
3. This act was designed not merely to give a remedy for the present injury sustained by the proprietor, but to settle and fix compensation adequate to the injury occasioned by the continuous diversion of the water. Therefore, if the writ commands the jury to ascertain the amount of damage which the defendant "sustains or may sustain," and the verdict is that he "sustains no damage," this is a substantial compliance with the statute. 455

WATER WORKS OF MOBILE—CONTINUED.

4. If the defendant was present, and objected to the action of the jury "because he was not duly notified of the time when the jury was to assemble," this objection cannot avail, on error or appeal, unless he affirmatively shows that the notice given him was too short to enable him to prepare for the protection of his interest. 455
5. The effect of a decision under this act, when the verdict of the jury is that the defendant sustains no damage, is to vest in the lessee the "absolute right to the land, water, privilege, or right condemned by the jury"; and therefore it is not erroneous to render judgment that the lessee "is entitled to the use of the waters of said creek, for and during their continuance, without any compensation for damages therefor to said defendant." 455
6. The defendant in the writ can only be taxed, under the statute, with the costs of the appeal and the attendance of witnesses; but if the court renders judgment against him for the costs of the whole proceeding, and he takes an appeal to the Supreme Court, the proper amendment will there be made at his costs. 455

WILLS.

1. A bequest to A "and his children," when A has no children either at the time the will is made, or when it takes effect by the testator's death, vests the absolute property in A; but where there is a specific bequest of slaves, with the addition of these words, to each one of the testator's children, some of whom are unmarried at the time the will is made and also at the testator's death, while others are married and have children living, and the vesting in possession is postponed until a future uncertain period, (as the death or marriage of the widow,) the children living when the property falls into possession take jointly with their parent.—Vanzant v. Morris, 285

WITNESS.

1. To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient.—Elam v. The State, 53
2. A person who removed into the neighborhood of an impeached witness, about the time the latter left, is competent to testify to his general reputation in that neighborhood at that time.—Martin v. Martin, 201
3. A witness may testify to the general character of an impeached witness for truth and veracity, both from his own knowledge and from what he has heard from other persons; and he may state that it is "very unfavorable." 201
4. When complainant has several times examined a defendant as a witness (once in chief, and twice on cross interrogatories) without raising any objection to his competency on the ground of interest, he cannot spring that objection for the first time on the hearing.—DeVendal v. Malone's Executors, 272
5. When a witness testifies, on his *voir dire*, that he was a partner of the

WITNESS—CONTINUED.

firm which is shown by other evidence to have been defendant's vendor of the goods in suit, he may testify to the further fact that said firm was also plaintiff's vendor, thus balancing his interest, and restoring his competency.—Tarleton & Pollard v. Johnson, 300

6. When the vendee files a bill to compel a conveyance, and to enjoin the vendor's action at law to recover possession of the land, the tenant in possession, being directly interested in perpetuating the injunction, is not a competent witness for the complainant —Bradford v. Harper, 337

7. A trustee, who, after accepting the trust, voluntarily permits his co-trustee to take the management of it, and the possession and control of the trust property, is equally with him liable to account; and on bill being filed against both for an account and settlement of the trust, he is an incompetent witness for his co-defendant to prove the insolvency of the debtors.—Royall's Adm'r v. McKenzie, 363

8. When money is borrowed by two jointly, but for the benefit of one, and a joint note given by them, on which they are both sued, either one is a competent witness under the statute to prove usury.—Swinney & Palmer v. Dorman, 433

9. When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and it does not lie with him to say that any portion of it is illegal or incompetent.—Jewell v. Center & Co., 498

10. If a party introduces and examines in chief a witness who has an interest adverse to him, he thereby waives all objection to his incompetency from interest, and confers on his adversary the right to examine the witness fully as to his knowledge touching any and all facts material to the case.—Kelly v. Brooks, 523

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